

PROJECT STATUS HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification)	Docket No.
for the El Segundo)	00-AFC-14
Modernization Project)	
_____)	

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

TUESDAY, NOVEMBER 20, 2001

9:10 a.m.

Reported by:
James A. Ramos
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Garret Shean, Hearing Officer

Ellen Townsend-Smith, Adviser to Commissioner
Pernell

Mike Smith, Adviser to Chairman Keese

STAFF AND CONSULTANTS PRESENT

David Abelson, Senior Staff Counsel

James W. Reede, Jr., Project Manager

Noelle Davis, Consultant

Tim Landis, Consultant

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

John McKinsey, Attorney,
Livingston and Mattesich
for El Segundo Power II, LLC, a joint venture of
NRG Energy, Inc. and Dynegy Power Corporation

Ron Cabe, Senior Director, Project Development
Dynegy Marketing and Trade

Tim Murphy
URS Corporation

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INTERVENORS

John H. Farrow, Attorney
California Unions for Reliable Energy (CURE)

Bob Perkins

Michelle Murphy

Nick Nickelson

ALSO PRESENT

Tony Rizk
Los Angeles Regional Water Quality Control Board

Laure Jester
City of Manhattan Beach

Paul Garry
City of El Segundo

Tom Luster
California Coastal Commission

Paul Ochs

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P R O C E E D I N G S

9:10 a.m.

HEARING OFFICER SHEAN: We are ready to begin. I'm Garret Shean, Hearing Officer for the El Segundo Modernization Project AFC Committee. With me are representatives from the Commissioners' offices. We have Ellie Townsend-Smith from Commissioner Pernell's Office; and Mike Smith from Commissioner Keese's Office.

We're going to proceed with our hearing on project status. This hearing arises from status reports issued by the Commission Staff and responding papers by the applicant.

Our purposes here today are to assess the status of the proceeding, the timeliness of the applicant's data submissions, and attempt to schedule either a portion or most of the remainder of the proceeding for a number of reasons.

We have chosen to conduct this hearing here in Sacramento and have a teleconference capability for the intervenors, City and government agencies in southern California. All in all, this is going to save us probably a great deal of time, money and inconvenience, given what it takes to travel these days.

1 So, this may become sort of a prototype
2 of how these things are done.

3 In any event, what I'd like to do --

4 MR. REEDE: Excuse me, Mr. Shean. Who
5 just rang in?

6 MR. RIZK: Tony Rizk from the Regional
7 Water Quality Control Board.

8 MR. REEDE: Rizk is R-i-z-k, first name
9 T-o-n-y; Los Angeles Regional Water Quality
10 Control Board.

11 HEARING OFFICER SHEAN: Okay. What I
12 propose to do is have those members of the
13 Sacramento audience who are parties, introduce
14 themselves, and then we'll go to all of you on the
15 telephone and ask you to introduce yourself in
16 order. And you'll probably step on somebody else
17 while they're talking, but we'll sort of go in
18 order from the group that's gathered together in
19 one household, and then through the cities and
20 other jurisdictions.

21 So, with that, why don't we go to the
22 applicant.

23 MR. MCKINSEY: Thank you, Mr. Shean. My
24 name is John McKinsey; I'm the Project Counsel for
25 this project, representing El Segundo Power II,

1 LLC.

2 Also here on behalf of El Segundo Power
3 II is Mr. Ron Cabe to my right; and behind me, Mr.
4 Tim Hemmick.

5 MR. REEDE: James Reede, Energy Facility
6 Siting Project Manager for the Energy Commission.

7 MR. ABELSON: David Abelson, Senior
8 Staff Counsel.

9 HEARING OFFICER SHEAN: Are there any
10 others present here in the audience? Okay, we'll
11 go to the telephones then, as they say, and hear
12 from our intervenors.

13 Why don't you go ahead, Mr. Perkins.

14 MS. MURPHY: This is intervenor Michelle
15 Murphy.

16 MR. PERKINS: And Bob Perkins. And
17 with us.

18 MR. NICKELSON: Is Nick Nickelson,
19 intervenor.

20 HEARING OFFICER SHEAN: Okay, let's go
21 to the City, then.

22 MS. JESTER: Laure Jester, City of
23 Manhattan Beach.

24 MR. GARRY: Paul Garry, City of El
25 Segundo.

1 HEARING OFFICER SHEAN: And to the Water
2 Board.

3 MR. RIZK: Tony Rizk, Regional Water
4 Quality Control Board, Los Angeles.

5 HEARING OFFICER SHEAN: Are there any
6 others on the telephone?

7 MR. LUSTER: Yes, Tom Luster with the
8 Coastal Commission.

9 HEARING OFFICER SHEAN: I'm sorry, Mr.
10 Luster.

11 MR. LUSTER: That's all right.

12 DR. DAVIS: Noelle Davis, Consultant to
13 the Energy Commission.

14 MR. LANDIS: Tim Landis, Consultant to
15 the Energy Commission.

16 HEARING OFFICER SHEAN: Okay, anybody
17 else who has not rung in?

18 MR. FARROW: John Farrow, representing
19 CURE.

20 MR. MURPHY: Tim Murphy with URS, -- the
21 applicant.

22 MR. REEDE: Excuse me, Hearing Officer
23 Shean, we also have Energy Commission Staff that
24 I'll be asking to make comments. May they
25 introduce themselves at this time?

1 HEARING OFFICER SHEAN: Why don't we do
2 that as they come up.

3 MR. REEDE: Okay.

4 HEARING OFFICER SHEAN: Just for
5 convenience sake.

6 We have several talking points, and let
7 me indicate to the members of the audience, if you
8 will, who are not physically here, I have handed
9 out a draft El Segundo schedule which has a lot of
10 blanks on it. And I think the basic thrust -- I'm
11 sorry?

12 MS. MENDONCA: Mr. Shean, I wanted your
13 record to reflect that the Public Adviser was here
14 this morning, Roberta Mendonca. Thank you.

15 HEARING OFFICER SHEAN: Yes, and, Ms.
16 Mendonca, thank you both for introducing a member
17 of the audience who was a property owner here in
18 Manhattan Beach, but lives in Davis, and he has
19 joined us. And also for your assistance in
20 setting up the rest of this meeting.

21 This draft schedule, as I've indicated,
22 has a lot of blanks in terms of deliverables from
23 both the applicant and the staff and the
24 Committee, so I guess it's not both, it's among.
25 And a lot of blanks in terms of dates.

1 I think the general thrust of what we
2 want to try to do, as I indicated from the top, is
3 first of all find out where we are; secondly, find
4 out what additional data submissions are required.
5 Get an estimate of the time that they will be
6 submitted, and then attempt to schedule the
7 remainder of the proceeding around that.

8 If people have comments or disagreements
9 about that as a potential process, we can get to
10 that. So why don't we have initially the staff,
11 then the applicant, and then any other party
12 indicating where they think we are and what we
13 think we need, or what they think has been
14 provided.

15 So, we'll go initially to the Commission
16 Staff.

17 MR. REEDE: Thank you, Hearing Officer
18 Shean. My name is James Reede, and I'm the
19 Project Manager for the Energy Commission
20 reviewing El Segundo's AFC.

21 On October 17th the South Coast Air
22 Quality Management District sent a preliminary
23 determination of compliance for the project.
24 However, this PDOC, as it's called, was not sent
25 out for public comment nor Environmental

1 Protection Agency review.

2 The Air District told us that it
3 wouldn't be publishing this for comment until the
4 issues surrounding the enhanced street sweeping
5 proposal were resolved.

6 Now, neither the Energy Commission Staff
7 nor the Air District Staff have seen the final
8 proposal. The applicant's been requested to
9 provide this information to the Energy Commission
10 in mid October, early November; and again on
11 November 13th, and it's not been delivered for our
12 review or analysis.

13 Because of this delay it's unknown when
14 the Air District will publish the PDOC. And when
15 it is published they are required to have a 30-day
16 comment period for the public, and a 45-day
17 comment period for the Environmental Protection
18 Agency.

19 We cannot issue the supplement to the
20 staff assessment air quality section until after
21 the final determination of compliance is received.
22 And that goes to your draft -- until the final
23 determination of compliance is received. And that
24 goes to your draft El Segundo AFC schedule where
25 you're showing a day N plus 140, the final

1 determination of compliance.

2 I would suggest that that FDOC be moved
3 up to approximately N plus 55, so that we can
4 incorporate into our supplemental staff
5 assessment, which is more or less synonymous with
6 the final staff assessment, those issues and
7 comments from the USEPA.

8 The reason that I ask that final
9 determination of compliance be one of the driving
10 critical path items is because this is a new and
11 radical type of method of getting emission
12 reduction credits.

13 Unless we have the EPA's comments, which
14 are normally contained in the FDOC, we would be
15 remiss to not only the public, but the applicant,
16 in including those comments on enhanced street
17 sweeping.

18 Additionally, we will not know how many
19 pounds per day of PM10s are secured through street
20 sweeping, and how many will be priority reserves
21 purchased from South Coast Air Quality Management
22 District.

23 So, it would be inappropriate from a
24 CEQA basis to issue our final supplement without
25 the knowledge of what the EPA had to say, and the

1 California ARB.

2 Now, in the preliminary determination of
3 compliance that was sent to us on October 17th,
4 there was a caveat that if either the ARB or the
5 EPA rejected enhanced street sweeping as a viable
6 method of obtaining PM10 emission reduction
7 credits, then, they, too at South Coast would
8 reject it.

9 It puts us in a quandary of having to
10 issue a document that may or may not be approved
11 by other governmental agencies. And so we would
12 much prefer, as staff, to have the information at
13 hand rather than guesstimate what's going to
14 occur.

15 Additionally, on to the subject of the
16 Coastal Commission and the consistency report, the
17 Coastal Commission issued their comments on the
18 staff assessment on October 4th and concluded that
19 they needed the same information that we were
20 waiting for.

21 While they disagree on the timing of the
22 impingement and entrainment validation study, the
23 liquification analysis, the slope stability
24 analysis and the construction laydown area
25 identification, they do agree that the studies are

1 necessary.

2 This item has been removed from the
3 Coastal Commission meetings in November and
4 December because of the lack of submittal of
5 information by the applicant.

6 The Coastal Commission Staff has made a
7 determination that the area is visually degraded,
8 which under the Coastal Act, requires the
9 applicant to enhance the visual quality of the
10 project. The Coastal Commission is expected to
11 issue a finding of visual degradation regarding
12 architectural enhancements -- I mean requiring
13 architectural enhancements.

14 In the opinion of the Coastal Commission
15 Staff the project fails to conform to the
16 requirements of the Coastal Act in four specific
17 areas.

18 Originally the Coastal Commission Staff
19 had agreed to bifurcate their final report with
20 the findings on biology to be voted on at the
21 Coastal Commission meeting in January. Well, that
22 has now been jeopardized.

23 And the Coastal Commission asserted in
24 their email of a couple days ago that the findings
25 of the Coastal Commission regarding consistency

1 with the Coastal Act would not be rendered until
2 the Energy Commission Staff issues its staff
3 assessment supplement.

4 We actually need the consistency report
5 to issue the supplement. So, it is imperative
6 that the applicant supply the missing information
7 in a timely manner so that the Coastal Commission
8 can perform their job; and we, consequently, can
9 put it into our final supplement.

10 HEARING OFFICER SHEAN: Okay, Mr. Reede,
11 I'm just trying to understand. In reading that
12 portion of your memo from yesterday, and this
13 whole cart-and-the-horse problem with the Coastal
14 Commission --

15 MR. REEDE: Right, we have had further
16 discussions with the Coastal Commission, and we'll
17 work it out. But we still need the information
18 before we can even begin to work it out.

19 HEARING OFFICER SHEAN: Well, is it that
20 you need their report to finish your staff
21 assessment --

22 MR. REEDE: Yes, we need a finding of
23 either consistency or inconsistency in the areas
24 that are either consistent or inconsistent so that
25 our conditions of certification meet the

1 requirements of the Coastal Act.

2 Now, the conditions of certification
3 that we would be drafting based upon their
4 consistency report would be in our final
5 supplement.

6 MR. ABELSON: Mr. Shean, if I might add
7 briefly, I know Mr. Luster is on the phone and we
8 did have some process oriented discussions with
9 him yesterday. And I don't know if you would want
10 to entertain it at this point, but you might want
11 to allow him to reflect what his thinking is at
12 this moment on that issue.

13 HEARING OFFICER SHEAN: Well, I do,
14 because trying to understand whether or not it is
15 that they will be relying upon your final staff
16 assessment for their vote, or you are going to be
17 relying upon the consistency report that they
18 voted on to finish your final staff assessment.
19 It can't be both, so --

20 MR. LUSTER: This is Tom Luster. The
21 primary concern on our end is the need for
22 adequate information. And if we get additional
23 submittals from the applicant in the various
24 areas, and have those in hand and can make a --
25 our Commission can review those and provide you a

1 final determination based on all that information,
2 I think that would be the way to go. And that
3 could happen before the final staff assessment
4 comes out.

5 I haven't been real clear on the order
6 of things here. If the final staff assessment
7 were to be issued based on the information
8 available right now, and at various times there
9 was talk about the -- excuse me, the supplemental
10 staff assessment coming out in a matter of days or
11 weeks, based on currently available information.
12 We would just schedule a hearing for our
13 Commission based on the information we had
14 available at the time, whether that be the
15 supplemental staff assessment or the information
16 provided by the applicant.

17 And make our recommendations based on
18 that. So whatever is out at the time.

19 I guess, bottomline, we can provide our
20 recommendation at anytime, given enough time to
21 schedule something in front of our Commission
22 based on whatever is in front of us, and it would
23 be up to you, the Energy Commission, to determine
24 what additional information, if any, we're going
25 to have in front of us, or the schedule for

1 issuing the supplemental staff assessment.

2 And then we will go with whatever is
3 decided on.

4 HEARING OFFICER SHEAN: Great, thanks.
5 That helps.

6 MR. ABELSON: Mr. Shean, just in closing
7 on that point, I think that what I believe Mr.
8 Luster is indicating, and I think is consistent
9 with what staff is indicating, is if we were to
10 close the record today then they can issue their
11 consistency determination as soon as he can
12 schedule it. And, of course, our final staff
13 assessment would follow that.

14 But based on everything that the Coastal
15 Commission has filed through staff analysis, that
16 basically would be a determination of
17 inconsistency, number one. And number two, it
18 would be predicated only on the information that's
19 in the record up to this point, when I believe
20 it's reasonable to say that the applicant's
21 intending to file additional information in
22 several areas.

23 So, the bottomline is that what I
24 understand the Coastal Commission to be saying is
25 they would like to get that additional

1 information, reflect on it, and then present their
2 position to their agency.

3 And they believe they can do that, in
4 fact, before our final staff assessment is issued.
5 And that would be the normal sequence around here,
6 as well, so we would encourage that.

7 HEARING OFFICER SHEAN: Okay. Back to
8 you, Mr. Reede.

9 MR. REEDE: Okay, thank you, Hearing
10 Officer Shean.

11 On October 31st the applicant submitted
12 comments on the staff status report of October
13 16th informing the Commission of the items they
14 would be submitting, and items to be discussed
15 during evidentiary hearings.

16 Subsequent to that filing, on November
17 the 5th the applicant submitted data responses
18 regarding the landscaping plan, storm water
19 pollution prevention plan, erosion and sedimental
20 control plan, traffic and transportation
21 supplemental information, and clarified the
22 accuracy of the visual effect of the proposed
23 project.

24 In regards to the visual effect and
25 impact of the project the applicant did not

1 provide any additional information, but told us
2 which particular rendering the plant will
3 resemble.

4 This is realizing that the Coastal
5 Commission will require visual enhancement of the
6 project due to their pending finding of visual
7 degradation of the area.

8 Now, on to the biology, and I have two
9 of my -- three of my biologists available, Dr.
10 Noelle Davis and Mr. Rick York -- the applicant's
11 revised marine survey biology protocol for the
12 project's impingement and entrainment validation
13 study was still unacceptable to staff after the
14 second revision.

15 That information was conveyed during a
16 teleconference on November the 2nd. The applicant
17 has recently proposed to deliver the impingement
18 and validation study based upon a third revision
19 of the study protocol and the staff comments by --
20 on or before December the 5th of this year.

21 Staff is still concerned that the
22 applicant's finalizing the protocol and beginning
23 the study without the benefit of staff's prior
24 review.

25 The analysis of the impingement and

1 entrainment validation study and the rewrite of
2 the biological resources supplement may take up to
3 60 days. Now, I can have Dr. Davis and Mr. York
4 address the 60 days, if I'm not explaining it
5 clearly enough. But once the information is
6 supplied to us we would begin evaluating it,
7 analyzing it to determine its validity. And then
8 we would send it for peer review to other marine
9 biologists. Then we would have to rewrite the
10 biological resources section.

11 If our analysis and our peer review
12 determines that the validation study is an
13 acceptable surrogate for a 316(b) impingement type
14 study, impingement/entrainment type study, it will
15 require that we change the biological resources
16 section.

17 And as I said, because we're going to
18 have to send it out for peer review, it would take
19 more than the normal 30 days review and analysis
20 that is shown.

21 The applicant has tried, over the past
22 year, to provide surrogate information for an
23 actual study. And whether or not this validation
24 study shows that there are impacts that may be
25 significant or no impacts, we need the time to be

1 able to evaluate that information.

2 Now, in addition to the impingement and
3 entrainment validation study, the applicant agreed
4 to submit new data and analysis relating to the
5 noise issue.

6 HEARING OFFICER SHEAN: Okay, before you
7 move on to that, I do have a question with regard
8 to what a validation study is. Because in the
9 past we've been talking about protocols to conduct
10 a study. And now we have the term validation
11 study.

12 And I'm trying to get a handle on is the
13 validation study a protocol --

14 MR. REEDE: Would be the results of the
15 protocol.

16 HEARING OFFICER SHEAN: -- for a
17 subsequent study? I'm sorry, just a minute.

18 MR. REEDE: Pardon me?

19 HEARING OFFICER SHEAN: Is the
20 validation study a protocol for a subsequent
21 study, or is it the study, itself?

22 MR. REEDE: It's the study, itself. The
23 protocol is how they're going to do the study.
24 And the validation study is the result of them
25 following a protocol which we would have hoped

1 that we could have agreed on before the study got
2 started, and hopefully, gets completed.

3 HEARING OFFICER SHEAN: Okay, so this is
4 the substantive result that either shows that
5 there are or are not, at least in the view of its
6 authors, --

7 MR. REEDE: Impacts.

8 HEARING OFFICER SHEAN: -- potential
9 impacts from the -- impingement and entrainment
10 impacts from the water source.

11 MR. REEDE: Correct.

12 HEARING OFFICER SHEAN: Okay.

13 MS. TOWNSEND-SMITH: And can I ask you a
14 question? When you talk about the peer review,
15 that's not a sister agency?

16 DR. DAVIS: The peer review will be
17 by --

18 MR. REEDE: Excuse me, that's Dr. Davis
19 speaking.

20 DR. DAVIS: Yeah. The peer review will
21 be by scientists with additional expertise in
22 these kinds of studies; specifically Peter
23 Raimondi of UC Santa Cruz, and Greg Kaiaai of Moss
24 Landing Marine Laboratories. Both of those
25 scientists have a great deal of experience with

1 previous studies of this type.

2 MR. REEDE: And because they both work
3 for the State of California, yes, to answer your
4 question, that would be technically from another
5 agency.

6 MS. TOWNSEND-SMITH: How long does it
7 usually take to conclude a peer review?

8 DR. DAVIS: Well, you know, I would
9 think that we would need to give them at least a
10 couple of weeks. They have to fit it into their
11 schedules. So, you know, I would say at least two
12 to three weeks.

13 MR. ABELSON: And I think, Mr Shean,
14 that the 60 days sort of derives from those
15 numbers. Once you get the study and put it out
16 for two to three weeks worth of peer review, and
17 receive that information into the record, staff
18 then needs basically to have a reasonable period
19 of time -- this is a fairly complicated and
20 technical area -- to analyze both the study,
21 itself, and the review of the study. And to
22 finalize basically its comments on whether biology
23 is a significant impact or not in light of that
24 updated study. So that's how you get
25 approximately the 60 days that are being talked

1 about.

2 MS. TOWNSEND-SMITH: Do you have any
3 idea how many projects we've done a validation
4 study, because we've been working on a number of
5 coastal projects recently.

6 MR. REEDE: Yes, we have. And it was,
7 well, we have normally always had a 316(a) or (b)
8 study performed prior to certification, or in
9 process, so that we had some data prior to
10 certification.

11 However, the applicant stated that there
12 were no impacts, and that they had previous
13 studies that could have been used for it.

14 Once we began investigating the previous
15 studies used, we determined that the previous
16 studies were actually from a power plant that was
17 55 miles away, and dated back to 1978.

18 MS. TOWNSEND-SMITH: I remember that.

19 MR. REEDE: So our confidence level in
20 whether or not the plant has impacts or
21 significant impacts was very low.

22 And the applicant chose to attempt to
23 show us scientifically, versus actually the
24 gathering of data, that there were no impacts.
25 And we've allowed the applicant to make this

1 attempt.

2 MS. TOWNSEND-SMITH: So the validation
3 study, now does the validation study include
4 actual data now? Or is it basically the study
5 that the applicant put together?

6 MR. REEDE: It does not include recent
7 data at the site.

8 MS. TOWNSEND-SMITH: So we're still
9 using data --

10 MR. REEDE: We're using --

11 MS. TOWNSEND-SMITH: -- from the '70s --

12 MR. REEDE: -- surrogate data from Kings
13 Harbor.

14 MR. ABELSON: The protocol is something
15 the applicant probably is best in a position to
16 explain. But, there is some considerably more
17 recent data from a considerably closer location
18 that, if I were to simplify it, in essence the
19 applicant is asserting that that data is good
20 enough to generate a reasonable conclusion. And
21 that data is quite a bit closer in time and quite
22 a bit closer in physical location.

23 Beyond that I think I'd let the
24 applicant explain what they're proposing to do.

25 MR. RIZK: This is Tony Rizk from

1 Regional Water Quality Control Board.

2 HEARING OFFICER SHEAN: Go ahead.

3 MR. RIZK: May I speak, Mr. Chairman?

4 MR. REEDE: Can you speak up some,
5 please, Tony?

6 MR. RIZK: I will do my best. Forgive
7 me that I couldn't be in person at the meeting.
8 Is this better?

9 HEARING OFFICER SHEAN: Yes.

10 MR. RIZK: Thank you. The Regional
11 Water Quality Control Board is a sister agency.
12 The Regional Water Quality Control Board had
13 reviewed the initial 316(a) (b) studies. And
14 further, the Regional Water Quality Control Board
15 does require the applicant to submit twice
16 annually biological monitoring -- water monitoring
17 surveyed in the area, in the vicinity of the
18 discharges, as well as -- away from the
19 discharges.

20 Our water monitoring program does cover
21 water quality, biological surveys, as well as
22 sediment quality.

23 Putting all of that together, in our
24 biologist review, the Regional Water Quality
25 Control Board had taken the position that the

1 existing 316(a)(b) studies are adequate for that
2 power plant.

3 We do not and have no intention of
4 getting into a very deep discussion, heavily
5 involved in this aspect, because this is the CEC's
6 jurisdiction. However, I would like to go on the
7 record as where our position is.

8 And we had provided a written support of
9 that position in a letter to the applicant, which
10 has been given to the CEC and it's part of the
11 record.

12 Thank you.

13 HEARING OFFICER SHEAN: Thank you very
14 much.

15 MR. ABELSON: The only comment staff has
16 on the point Mr. Rizk made is two things. Number
17 one, the issue of whether or not the legally
18 required compliance with LORS and 316 studies that
19 would normally go along with that for a new permit
20 have been met. Are actually not the issue that's
21 in controversy at the moment.

22 The question is whether or not there is
23 or is not a significant impact from the new
24 proposed facility.

25 There's an extensive amount of

1 additional analysis that we believe we can present
2 that would indicate that the information that Mr.
3 Rizk is referring to does not answer that question
4 completely, although it contributes to the answer.

5 And, in addition, for process purposes,
6 just in terms of what we're talking about today,
7 the applicant, unless they say something to the
8 contrary today on the record, is fully intending
9 to provide this updated information.

10 So, for purposes of the status
11 conference and how we proceed from here, basically
12 everybody still needs to see that, assuming it's
13 going to be part of the record, before we can move
14 forward.

15 HEARING OFFICER SHEAN: I'm aware of the
16 legal versus the new validation study issues.
17 We'll get into them because we at least want to
18 sort of find out whether or not we're pleading
19 this in the alternative, et cetera. But that
20 awaits their presentation.

21 Okay, Mr. Reede, you were going to go to
22 noise.

23 MR. REEDE: Yes. In addition to the
24 impingement and entrainment validation study, the
25 applicant agreed to submit to the staff new data

1 and analysis related to noise issues.

2 Once this information is provided, staff
3 will have to validate and analyze the submittals.
4 And then prepare a staff assessment supplement.

5 This issue is of major concern to the
6 residents in Manhattan Beach and to the
7 intervenors who also happen to live in Manhattan
8 Beach.

9 Staff has expressed a concern just
10 recently on the phone that in our condition of
11 certification for noise we had asked that a noise
12 survey be taken during the period June 1st through
13 August 31st, because that is a noise monitoring
14 envelope that more realistically can represent the
15 ambient.

16 However, because we have not received
17 this new information from the applicant we are not
18 ready to rule it out. However, we had asked, back
19 in June, that there be additional noise monitoring
20 in an attempt to establish an ambient.

21 The applicant submitted various soil and
22 water resources and waste management data
23 responses on November the 5th. There's some
24 outstanding issues that remain relating to
25 inadequacy of those data responses in the existing

1 soil and water groundwater contamination and the
2 proposed remediation activities.

3 We have pretty much finished preparing
4 the list of inadequacies to those data responses,
5 and they'll be transmitted to the applicant by
6 tomorrow.

7 Now, going back to the schedule, the
8 project committee had been requested to file a
9 scheduling order for this project. Staff had
10 initially used the ten-month schedule that was
11 presented during the information hearing as its
12 guide.

13 Based on the schedule and the date that
14 South Coast was to file the preliminary
15 determination of compliance, which was April 30th,
16 the project is now six months behind schedule.

17 In the October 16th status report staff
18 asked that the Committee consider suspension of
19 the project as an option. Staff requested the
20 Committee continue to consider this option based
21 on the uncertainty of submittal of the required
22 information.

23 Staff is also requesting that discovery
24 be reopened, and that staff have a minimum of 30
25 days to complete its analysis and prepare a

1 supplement after receipt of all outstanding
2 deliverables, as well as the FDOC.

3 Now, some of the outstanding
4 deliverables that we still maintain we need: The
5 architectural treatment of the facility to include
6 photographic renderings, with the knowledge that
7 the California Coastal Commission will be finding
8 that this site is a visual degradation of the
9 beach community.

10 The alternative water supply plan, which
11 is the reclaimed water usage. The FDOC. The
12 impingement and entrainment validation study. The
13 new ambient background noise projections. The
14 ground and water contamination remediation plans.
15 And the storm water pollution prevention plan
16 clarifications.

17 The reason that we are requesting that
18 discovery be reopened is because there will be a
19 number of submittals that we may have questions
20 relating to. Unless those questions are answered,
21 and the discrepancies clarified, we will be unable
22 to negatively or positively conclude our analysis
23 for the benefit of the public or the applicant.

24 Now, going back to the draft schedule
25 that you had provided, Hearing Officer Shean, --

1 HEARING OFFICER SHEAN: Why don't we
2 wait on that --

3 MR. REEDE: Oh, okay.

4 HEARING OFFICER SHEAN: -- till after we
5 hear from the applicant, CURE, and others.

6 MS. TOWNSEND-SMITH: And I have a couple
7 of questions, also. I guess what I'm trying to
8 figure out is there's a number of outstanding
9 issues already out there. It sounds like, from
10 the status report, that the applicant is well
11 aware of these status issues.

12 Now, what you said doesn't seem to be
13 that far above what they already are required to
14 submit. Why is a 30-day -- you have to explain
15 that again. Why would a 30-day additional
16 discovery period be necessary if all of these
17 issues are already out there?

18 MR. REEDE: Well, once they submit these
19 critical path items, we have to look and see
20 whether they responded to the needs of a CEQA
21 review. If they submit the noise information and
22 there's some unreadiness or a need for
23 clarification, we have to have the ability to ask
24 questions so that it can become part of the
25 record.

1 MS. TOWNSEND-SMITH: But the submittal
2 has to be acceptable before the staff can make an
3 analysis regardless, right?

4 MR. REEDE: Correct.

5 MR. ABELSON: In the end, I don't know
6 that it has to be acceptable in some sense of the
7 word. What it has to be is in, final, and with us
8 having had a reasonable opportunity to ask some
9 clarifying questions that we need in order to
10 understand what was submitted.

11 MS. TOWNSEND-SMITH: But without
12 discovery wouldn't staff be able to ask those same
13 questions?

14 MR. ABELSON: I think the problem that
15 we're running into is one of timing in terms of
16 when the supplemental or final staff assessment is
17 due. Basically I think, under the schedule that's
18 standard around here, you would normally have the
19 actual assessment out about 30 days after the
20 documents are filed.

21 In this case, because there is
22 anticipation on staff's part that several of these
23 documents are going to be quite substantive,
24 potentially, in nature -- the biology one in
25 particular, possibly the noise one depending on

1 what it reflects -- I think staff is concerned
2 that they be given a reasonable opportunity to ask
3 some questions about those substantive changes
4 before they then try to write their report.

5 And if that gets all collapsed into that
6 30 days, there simply may not be enough time to
7 both generate the questions, get the answers, and
8 then actually produce the final staff assessment
9 all within 30 days of the submittal of the
10 technical material.

11 MS. TOWNSEND-SMITH: Okay, thank you.

12 HEARING OFFICER SHEAN: Okay, Mr.
13 McKinsey.

14 MR. MCKINSEY: Thank you, Mr. Shean.
15 I'd like to begin first by thanking the CEC Staff,
16 the Committee and really, indeed, all the parties
17 that are not only here today, but over the course
18 of the last nine or ten months we've put in an
19 amazing amount of energy.

20 And our vision and our focus, I think,
21 is the same as everyone's. We would like to, and
22 I think everybody else would like to, see that if
23 there is the ability to produce electricity in a
24 more efficient means for a potentially longer
25 period of time at the El Segundo site in an

1 environmentally responsible way, that that's
2 something that would serve the interest of
3 California, and it's something that would also
4 serve our interests.

5 And I believe that the answer to that is
6 that it is yes, that we can do that. And that's
7 kind of the larger perspective, is that regardless
8 of how much we're talking about a lot of things
9 that don't have to do with producing electricity,
10 our main focus is that we're making sure that
11 these things are environmentally responsible and
12 that they comply with all the applicable laws.

13 And given that I'd like to kind of
14 emphasize two perspectives that I think have
15 gotten lost. First, the Energy Commission is a
16 unique agency with a tremendous amount of
17 authority and decision-making power.

18 And a lot of times when they work with
19 other agencies in the State of California that
20 becomes a confusing situation.

21 So, for instance, in a lot of the
22 discussions, not just today, but over the course
23 of this project and other projects, for instance
24 the Coastal Commission and its role in the Energy
25 Commission's process has arisen.

1 And in addition, there's often issues
2 when we talk about the air districts, and the fact
3 that they're doing essentially a duplicative
4 permitting process. And because they're the lead
5 agency, and the only authority to decide what air
6 conditions will be issued on a project, and then
7 the Energy Commission would supplement those, not
8 under the federal laws, but under the state laws,
9 under the concerns that the federal law is not
10 adequate in protecting the environmental health of
11 California, that they would add other things to
12 it.

13 That often brings us into weird
14 situations where agencies like the Coastal
15 Commission or the Air District, which are used to
16 doing things in their method, in their process, in
17 their system, find themselves either, in some
18 cases, having to simply provide their input to the
19 Energy Commission.

20 And that would be an example of the
21 Coastal Commission, where they become a
22 contributor of insights, and truly relative and
23 important insights, but nevertheless it's the
24 Energy Commission that remains the decider.

25 Or something such as the air districts,

1 where the air permit is, in and of itself,
2 something that the Energy Commission doesn't have
3 any authority over, because the federal laws say
4 that the air district is the deciding agency for
5 the permit conditions.

6 And, in here today alone that
7 perspective I kind of thought was lost. And I'd
8 like to start by saying that our position
9 regarding the Coastal Commission and its role in
10 this process is that the Energy Commission's
11 required to consult with the Coastal Commission
12 when projects affect the coastal zone. And that
13 they are required to seek the Coastal Commission's
14 input.

15 They are not required to have decisions.
16 And the Coastal Commission doesn't decide issues
17 regarding this project. They are able to give
18 their assessment and their opinions, and that it
19 is the Committee, and ultimately the full
20 Commission, that has to make the decisions
21 regarding whether or not the project complies with
22 any particular law, including the California
23 Coastal Act.

24 And certainly, like any agency, the
25 agencies have to try to work together and they

1 have to try to cooperate.

2 And one of the issues that I've seen
3 come up before, and I think it may be presenting
4 itself here, is the Coastal Commission is already
5 a very busy agency. And frequently their ability
6 to get their comments in is behind a little bit of
7 the pace that the Energy Commission is normally
8 trying to do, let alone in these days and times.

9 But in terms of what we're talking about
10 we have to have from the Coastal Commission and
11 what we have to see, we've already completed the
12 basic requirement, which is that we consult with
13 the Coastal Commission. And a lot of this was
14 discussed heavily in the original, really the
15 first situation involving the two agencies, the
16 Moss Landing project.

17 And since then there have been three
18 other projects involving the Coastal Commission,
19 Morro Bay, Huntington Beach and El Segundo. And
20 they're all different projects in many ways.

21 That's my second perspective, is the
22 project, itself. And it's often enormous. We
23 develop a means of addressing a project and then
24 we tend to think that this is a one-size-fits-all
25 and we can apply it in every other project.

1 And it's often my task to try to show
2 where there are differences. And there are unique
3 characteristics that make one project very
4 different, requires a different approach or a
5 different permitting style.

6 In the area of biology that is very very
7 clear. Another example of how this project has
8 unique issues is, involves its status that it's in
9 the South Coast Air Quality Management District.
10 That's a region that needs power plants. And it's
11 a region that has a tremendous issue with scarcity
12 of PM10 emission reduction credits.

13 And those two unique characteristics of
14 the project really drive a treatment that is not
15 typical and not usual.

16 And so when I talk about what I think
17 the data adequacy, the actual data that is
18 essential in order for the Energy Commission to
19 evaluate the project, as opposed to what it might
20 normally receive, and what it might normally do,
21 and/or what it might like to have, I think the key
22 thing you have to focus on is given California's
23 Warren Alquist Act, and the California
24 Environmental Quality Act, and then the laws that
25 it has to verify projects comply with, and given

1 this project's unique characteristics, what
2 exactly is the necessary information and the
3 necessary steps.

4 It's those perspectives. One, the
5 perspective to keep straight that the Energy
6 Commission is the deciding authority except for a
7 few federal laws which they don't have
8 jurisdiction over, such as the Clean Air Act and
9 the Clean Water Act, which have been delegated to
10 particular agencies; the L.A. Regional Water
11 Quality Control Board in the case of the Clean
12 Water Act; or the South Coast Air Quality
13 Management District in the case of the Clean Air
14 Act.

15 Other than that, the Energy Commission
16 is the deciding authority, and does have to take
17 on the responsibility of deciding when they are
18 not going to wait for further input or further
19 clarification from other agencies. And when they
20 feel they've done their job in terms of
21 cooperating and working with other agencies.

22 And that's a very tough decision, but
23 it's a different one than injecting necessary
24 requirements from agencies such that you end up
25 talking about things such as, well, we have to

1 have this document in order with this document
2 from this agency.

3 And the one area we always run into
4 that, in particular we've had it in the South
5 Coast, is the air permit issued. Because there
6 you have an actual situation where the Air
7 District does have to complete the permitting
8 requirements.

9 And one other perspective I wanted to
10 overlay on this is none of what we are doing
11 involves changes to the project at this point.
12 We're not trying to change the characteristics of
13 the project; we're not trying to change any of its
14 impacts. All we are really trying to do is to
15 continue, whenever possible, to provide useful and
16 relevant information where parties say that that
17 information would help them assess the impacts of
18 the project. And they would like to receive that
19 information.

20 The frustration we've had, often we've
21 said we want to try to produce information, it's
22 been turned into this information must be
23 produced. And so at some point, as we continue to
24 dialogue about how everybody would like to see the
25 information chain, we're going to have to draw a

1 line and say we can't go any longer on this
2 because we want to get a decision on this project
3 ultimately.

4 So, with those perspectives,
5 specifically on the air permit, I'm disappointed
6 that the Air District is not on this hearing
7 today. As I understand the position of the Air
8 District, and actually as I've reviewed the Clean
9 Air Act and the South Coast Air Quality Management
10 District's regulations, they have issued something
11 that they're calling a preliminary determination
12 of compliance. That's a document that doesn't
13 exist in their regulations.

14 They have a determination of compliance.
15 And it's something that they do in order to assist
16 agencies such as the Energy Commission when
17 they're trying to make decisions, prior to issuing
18 an air permit because they have to wait until CEQA
19 is satisfied.

20 But their position, very firmly, as I
21 understand it, is -- and I think it was correctly
22 described by Mr. Reede's report from yesterday as
23 he read today, that they are not going to issue a
24 notice, neither a 30- nor a 45-day comment notice
25 on the preliminary determination of compliance

1 until the street sweeping offset program is
2 resolved.

3 Now, what wasn't said is that it's their
4 position that the document they have issued is
5 more than adequate for the Energy Commission to
6 proceed. And that they do not feel that they're
7 holding up this permit process at all by having
8 done this step. Their legal review of their
9 obligations and their responsibilities says that
10 they have completed a determination of compliance
11 that will allow the Energy Commission to begin
12 their work in deciding things.

13 And that prior to you issuing a final
14 decision, you have to have a final determination
15 of compliance. That comports with the Clean Air
16 Act. And I think it comports with the Warren
17 Alquist Act and its responsibilities.

18 Certainly there's a possibility, and
19 I've seen this discussed before in projects, where
20 the Air District makes a change, a substantive
21 change. You catch a little delay where you have
22 to then -- the Energy Commission has to consider
23 what is changed, what the Air District has said,
24 we want to change this condition or that
25 condition. And so you have the possibility of

1 having to conduct a short hearing on the changes
2 that the Air District imposes, if they make any
3 changes. But other than that, there's nothing
4 that would prevent us from proceeding except for
5 this issue of whether or not there is adequate
6 information about the street sweeping.

7 We have maintained all along that should
8 street sweeping not function that we are going to
9 rely upon the priority reserve. And the
10 preliminary determination of compliance was
11 surprising to us in a way because we had been
12 hearing that the South Coast was going to probably
13 reject street sweeping as a means of providing
14 PM10 offsets.

15 When they issued the preliminary
16 determination of compliance last month it says in
17 it that they're willing to proceed under the idea
18 that it's going to be one, either priority
19 reserve, or street sweeping credits. And that
20 they want to see, from us, after they give us
21 feedback, exactly what it is that they can approve
22 or not approve.

23 The current exact status of that is that
24 they have not given us any feedback. We have no
25 idea what information they want, and specifically

1 on Thursday, Pang Mueller from the South Coast Air
2 Quality Management District told Gary Rubenstein
3 from Sierra Research, that she had passed it off
4 to a particular group which is assigned to assess
5 and design these things, and that they have not
6 gotten to it yet.

7 And so that she wouldn't make a
8 commitment as to when they would be able to give
9 us feedback on street sweeping.

10 Now, he had a strong conversation
11 saying, you know, if you really want this to
12 become -- and we either have to get this moving or
13 it's going to go by the wayside because we're out
14 of time, he tried to emphasize to her specifically
15 that in order for us to complete street sweeping
16 we need to get your input so that we can provide
17 the final details that you're asking for.

18 Now, the Energy Commission has stated,
19 the staff, that they feel that they have to have
20 those details and that protocol on street sweeping
21 in order to provide their project assessment. And
22 I'm hesitant to blanketly agree with that, because
23 I would rather hear what particular information
24 they don't have right now that is necessary, that
25 could be a driver of a significant impact.

1 Because the Air District is going to be
2 the determiner of whether or not it complies with
3 the Clean Air Act, not the Energy Commission,
4 because they have that authority. And so the
5 necessity for the Energy Commission to have
6 additional information about potential offsets
7 would be if there isn't enough detail for them to
8 understand whether there is a potential impact,
9 either individually or cumulatively, under CEQA,
10 the California Environmental Quality Act, as a
11 result of our entire project, including its air
12 portion.

13 And if that is the case, just like we're
14 dealing with the South Coast, if we know what
15 particular piece of information they don't have,
16 for instance do they not know exactly how many
17 vehicles will be running, or when they'll be
18 running, or what it is they require to know,
19 whether or not it's a significant impact, we could
20 deliver that information.

21 Another possibility, and I don't know
22 why it can't be done, is to make a worst case
23 assumption. Decide whether priority reserve 100
24 percent, or 100 percent street sweeping is the
25 worst case impact, and assess the project that

1 way.

2 Because all they really need to conclude
3 is that there is no significant impacts under the
4 California Environmental Quality Act.

5 Another possibility might be that we
6 will simply have to surrender pursuing street
7 sweeping. And go directly to the priority
8 reserve. That's what the PDOC already
9 encompasses, and so there would be no need to make
10 any changes whatsoever.

11 There would be no need to make any
12 changes other than some particular conditions
13 about how the street sweeping program would be
14 run, which might not be major revisions; it might
15 not require any significant treatment at the
16 Energy Commission level or the South Coast Air
17 level.

18 But, clearly, right now the South Coast
19 is telling the Energy Commission, according to
20 what Pang Mueller has told us, that they want you
21 to proceed with the determination of compliance,
22 the PDOC that they have issued, to use that as
23 your guideline for the conditions they're going to
24 issue on this project.

25 And we're stuck between a rock and a

1 hard place, because they're telling us they want
2 street sweeping; we can't get an assessment from
3 them because they're very busy doing many things.
4 And we're being told by the Energy Commission that
5 that is a barrier to them completing their
6 assessment.

7 And yet, ultimately it is clearly in the
8 interests of the South Coast, and in the interests
9 of the State of California to do anything they can
10 to further facilitate the development of power
11 generation in the South Coast Air Quality
12 Management District.

13 And because PM10 is a critical shortage
14 resource in the South Coast Air Quality Management
15 District, I would hate to see an opportunity to
16 develop a new source of emission reduction credits
17 be missed simply because we're forced, at one
18 point, to draw a line as the only means we're able
19 to advance the project. When I don't think that's
20 required under the California Environmental
21 Quality Act or the Warren Alquist Act.

22 The other issue under air was the
23 difference between proceeding with a staff
24 assessment, a final staff assessment, before,
25 after an FDOC. And I heard some clarification

1 today which helped me better understand the
2 staff's position that the street sweeping program
3 is unique.

4 Because it's unique they don't want to
5 go past a final staff assessment without seeing
6 the characteristics of the street sweeping
7 program.

8 Prior to that the assertion I heard was
9 they can't do a final staff assessment until they
10 have an FDOC. But I could very quickly go through
11 a list of projects that have done just the
12 opposite of that; that have been more than willing
13 to proceed with the PDOC with the final staff
14 assessment. And there's some adjustments through
15 the evidentiary hearing process if there are major
16 changes between the PDOC and the FDOC that I've
17 seen times when they've formula changes, such as
18 in Mountainview, the only other -- the only state
19 permitted power plant in the South Coast Air
20 Quality Management District in which there were
21 some minor revisions between the PDOC and the FDOC
22 and they were handled with a minor evidentiary
23 hearing as a supplement to the original
24 evidentiary hearings. And then the proposed
25 decision was capable of being completed.

1 So, I don't think that at this point
2 unless there are some particular details I'm not
3 aware of that is preventing the Energy Commission
4 from assessing the impacts of using street
5 sweeping, that there is any barrier in the area of
6 air quality that would prevent the production of a
7 final staff assessment or a supplemental staff
8 assessment, whatever we call it, on the area of
9 air.

10 And the area of air was one of the
11 particular areas where the staff assessment was
12 incomplete. That it didn't provide any resolution
13 or any proposed testimony.

14 In the area of noise, --

15 HEARING OFFICER SHEAN: Let me, just
16 before you go on, because we might as well delve
17 into this at this particular point.

18 First of all, I'm very aware of the past
19 practices of the Commission, both basing the staff
20 assessment, as well as the Presiding Member's
21 Proposed Decision on a preliminary determination
22 of compliance, in anticipation of having the final
23 determination of compliance largely conform to
24 what was in the preliminary.

25 And we've had an instance here recently

1 where if there were significant changes we
2 basically brought the matter back to the
3 Committee; have evidentiary proceeding on a new
4 and different final DOC. And attempted to afford
5 the parties essentially an opportunity to litigate
6 the differences and the way the final finally
7 worked out.

8 We've learned something from that
9 process, and I guess one of the things we've
10 learned is that while it is do-able, we also have
11 to have our eyes open in terms of what else do we
12 know.

13 And I guess what we know in this
14 particular instance is that in terms of the notice
15 that begins the formal review periods for the
16 preliminary determination of compliance, those
17 aren't out; or that single notice, I'm not sure if
18 it's one or more. But, anyway, that that period
19 would start a 30-day notice for general public,
20 and apparently a 45-day notice for the EPA.

21 And then after that period there will be
22 a final DOC which may or may not, I guess in this
23 instance, allow the enhanced street sweeping as a
24 PM10 mitigation or not.

25 I also have the sense, simply because

1 I've been doing this too long, that the absence of
2 that formal notification doesn't mean that there
3 aren't exchanges going on back and forth in an
4 attempt to determine whether or not, sort of in a
5 side proceeding, or at least out of the
6 formalistic proceeding, they're going to allow you
7 to use this enhanced street sweeping. And at some
8 point enough of a decision will be made that
9 they'll issue the notice and then move forward.

10 What I anticipate is that because of
11 this unique circumstance of an informal PDOC, a
12 yet to be noticed official or formal PDOC,
13 followed by an FDOC, is that we are going to run
14 into a mark-time situation. Because it's not
15 clear to me would be, even if you could foresee it
16 being appropriate for the staff to create its
17 final staff assessment based upon this unofficial
18 PDOC, I'm not sure it's appropriate for the
19 Committee to issue a Presiding Member's Proposed
20 Decision on something for which the comment period
21 has not begun.

22 Because at least the theory has been so
23 long as the PDOC comment period has started, and
24 you know you will conclude that in the time period
25 that the comment period on the PMPD ran, you would

1 never get yourself in a situation where the
2 Presiding Member's Proposed Decision wouldn't, in
3 some way, reflect the official actions of the Air
4 District.

5 So, given that, you know, our choice
6 seems to be between an unofficial PDOC that
7 generates the final staff assessment, or an
8 official, and I'm just using that in quotes here,
9 PDOC that would allow the Committee to go forward.

10 Now, is it your view that the unofficial
11 and the official PDOCs are anticipated to be the
12 same? Or this side process is going to produce
13 something different?

14 MR. MCKINSEY: As I understand it, that
15 specifically the South Coast doesn't feel that
16 what they've issued is an unofficial PDOC. They
17 feel that -- in fact, when I looked at the
18 regulations I couldn't oppose them -- that they
19 had issued a PDOC. There's nothing that says that
20 what they -- the PDOC has to be something that is
21 issued, that is noticed. The notice is something
22 they have to do prior to completing an FDOC. They
23 have to give a comment period to the public and to
24 the EPA.

25 And the closest you have any discussion

1 of this is in a delegation agreement between the
2 South Coast and the EPA. And even in there it
3 doesn't actually say that this thing called a PDOC
4 is a document that is noticed.

5 So they would say that what they've
6 given you is the official PDOC. Now, they may
7 notice something that has a few slight
8 differences, but that would also be, in other
9 words, you know, changes can be injected that way.
10 They can also inject changes if they notice a
11 document, and then they receive input, and then
12 they invoke changes which they issue in the form
13 of an FDOC.

14 HEARING OFFICER SHEAN: Well, what's
15 your view on a likely Committee position that in
16 the absence of notice on this PDOC that the
17 Committee should not be conducting evidentiary
18 hearings?

19 MR. McKINSEY: I think you were very
20 accurate in pointing out the difference between
21 issuing a proposed decision based on a document
22 that hasn't been noticed, as opposed to conducting
23 evidentiary hearings.

24 And my debate was that not under whether
25 or not the proposed determination of compliance is

1 adequate for the Committee to make a proposed
2 decision on, but whether or not it was adequate
3 for the staff to issue a staff assessment.

4 And that is my point, that the South
5 Coast says it is. I don't know how, under their
6 rules, you can tell them otherwise. And, indeed,
7 it has all of the characteristics and the only
8 change we would expect would be a potential
9 inclusion of a specific protocol for the street
10 sweeping ERCs, which get approved through a
11 parallel process as an approved offset. An
12 approved ERC. And get incorporated by reference
13 into a PDOC.

14 HEARING OFFICER SHEAN: And the universe
15 of choice, as you see it, is either approval of
16 this enhanced street sweeping, or you go into the
17 priority reserve offsets, strategic reserve --

18 MR. MCKINSEY: Well, in fact, the South
19 Coast has given us -- that was why I was very
20 pleasantly surprised by the PDOC, because it
21 said -- I thought they were going to force all
22 this to be resolved before they would issue the
23 PDOC.

24 But they looked at it and they said,
25 essentially for impact purposes there isn't any

1 difference between street sweeping or priority
2 reserve. So we can issue a PDOC that says it's
3 going to be all of one, or all of another, or some
4 part.

5 And so, in particular, what we now have
6 is a PDOC, which we haven't objected to, is a
7 document that says you've got these particular
8 PM10 ERCs. You've got a little bit accomplished
9 through exchange of other pollutant ERCs. And
10 then the remainder is going to be priority
11 reserve. And last, you're able to carve off a
12 chunk of it or all of it as the street sweeping
13 program.

14 And that for their purposes they were
15 equivalent for overall issues of Clean Air Act
16 compliance and environmental issues. And so
17 that's why they're comfortable giving us a PDOC
18 which maintains the flexibility as long as
19 possible.

20 HEARING OFFICER SHEAN: Okay.

21 MR. REEDE: Mr. Shean.

22 HEARING OFFICER SHEAN: Yes.

23 MR. REEDE: My air quality engineer had
24 a couple questions for the applicant as relates to
25 this particular issue. May he ask those? Since

1 we're at this point of their discussion.

2 MR. MCKINSEY: I don't have an air
3 engineer here.

4 MR. REEDE: Well, it's not technically
5 related, but it is related to the subject that's
6 being discussed, the PDOC, approvals by the ARB,
7 EPA, and it's germane to the item being discussed.

8 HEARING OFFICER SHEAN: Okay, if he
9 wants to make a point, I don't know that he may be
10 able to answer. Then, also, I think -- I mean I
11 guess the choice here is either you went through
12 all of your presentation without --

13 MR. REEDE: Right.

14 HEARING OFFICER SHEAN: -- fundamentally
15 interruption.

16 MR. REEDE: Okay. We can come back to
17 it; that's not a problem.

18 HEARING OFFICER SHEAN: Okay. Why don't
19 we go ahead and do that, because at least my notes
20 will work out --

21 MR. REEDE: Okay.

22 MR. MCKINSEY: In the area of noise, we,
23 once again I want to point out we're not talking
24 about changing the project in any way. What we're
25 trying to do is find ways to present more

1 information if the time is available that is
2 useful. And in this case not just to the Energy
3 Commission but to the City of Manhattan Beach, the
4 El Portal community intervenors and the El Portal
5 community of Manhattan Beach's residents in
6 general, and to the City of El Segundo, the
7 parties that are very interested in the
8 operational noise characteristics of the project.
9 And the changes primarily that are going to be
10 brought about by the removal of the tanks.

11 This is an area that is challenging to
12 describe and to analyze using noise science, using
13 the noise analysis science, because it involves a
14 large source of noise, the ocean, which is often
15 described instead of as noise, as sound. Namely
16 because the definition of noise is usually
17 unwanted sound.

18 It involves noises from LAX, the jets
19 taking off in two- to four-minute intervals, as I
20 now understand it. And it involves the normal
21 type of suburban noise you get which is traffic
22 and doors shutting and opening and conversations
23 and things such as that.

24 And then in addition there is a power
25 plant there. And the southernmost unit of that

1 power plant, unit 4, its line of sight, visually,
2 and also for purposes of noise, is interrupted by
3 two large fuel oil storage tanks.

4 And the removal of those tanks has
5 created concern that it's going to increase the
6 noise levels on 45th Street. And, indeed, our
7 task in providing an AFC is to make predictions in
8 modeling of what we think those changes will be.

9 When you make those modeling
10 predictions, however, what you do is you attempt
11 to say this is what the standard is, and if we do
12 this analysis with this degree of certainty can we
13 conclude that we're under that requirement.

14 And we've had a lot of dialogue about
15 what the requirements are. And the norm in the
16 State of California, the norm in the science
17 industry and in most cities is not more than a 5
18 decibel increase can be allowed.

19 We've obviously had a lot of dialogue
20 about what the standard would be under the City of
21 Manhattan Beach's ordinance, which states, quote,
22 "no increase is allowed." But it's been
23 dialogued, and the latest idea was that the City
24 of Manhattan Beach said that they felt that meant
25 it couldn't be a 2 decibel increase.

1 What we have done is we have gone back
2 and we have done an exhaustive search of all the
3 other tools out there available to assess what the
4 changes in the noise environment would be. And we
5 found two other ways to do it, and that's what we
6 have been working furiously to try to make into a
7 solid piece of scientific evidence that we could
8 invoke into the record.

9 And it is our desire, and as I have a
10 happy understanding it is the Energy Commission's
11 desire that if we have the ability to provide that
12 information, especially if it's very relevant
13 about even more particular precise information
14 about exactly what changes we can predict, to what
15 degree of accuracy on the 45th Street community,
16 that we should get that into the record now so
17 that the staff assessment, if there's going to be
18 a supplement to the staff assessment, they could
19 also change the noise section, which right now
20 stands as the staff assessment.

21 But this would allow them to potentially
22 revise their proposed conditions and revise their
23 analysis. And we would like to accomplish that.
24 And we are on pace to clearly be able to provide
25 that by December 5th.

1 There's two pieces of information that
2 we're going to be adding to this already robust
3 record about the noise environment
4 characteristics. We're using a program that
5 allows you to model multiple sources of sound, and
6 feed in fact geographical data about the terrain
7 features, the objects and actually produce a much
8 more accurate model because you're able to
9 simultaneously infuse multiple sources of sound,
10 and what the changes will be.

11 The second piece of item is we had an
12 opportunity with a scheduled shutdown and startup
13 of unit 4 to conduct readings while unit 4 was
14 being shut down and started back up.

15 And what this allows us to do is a
16 reverse engineering, so to speak, interpretation
17 of what the changes would be on a very worst case.
18 Because if we're taking the sound directly from
19 unit 4 at a distance, and we register what the
20 change is when unit 4 goes away, that would be the
21 equivalent if the tanks were shielding all of unit
22 4 noise, all of it.

23 And so it would be a wonderful worst
24 case indication of if the tanks were shielding all
25 of the noise for a particular receptor, how much

1 would the change be.

2 In addition, in order to accurately use
3 these features we've done a lot of monitoring of
4 ocean sound levels. We've done a lot of research
5 on the theory and the existing knowledge about
6 noise and sound coming from the ocean. And we've
7 actually done some statistical analysis of ocean
8 noise data there.

9 We've worked out models for how ocean
10 sound behaves relative to tide, wind and surf.
11 And what we're putting together, using the
12 engineering program, is also relative to the
13 shutdown approach to modeling. It is a much more
14 robust and more detailed prediction of changes
15 which allows us to make a more precise estimate,
16 instead of trying to say we're under 5 decibels.

17 I think that information will be very
18 valuable and that's why we agree that to the
19 extent that the staff wants to issue a
20 supplemental staff assessment, we would like to
21 get that to the staff so that they can incorporate
22 it in the area of noise. Because we believe that
23 it will alleviate and address specifically the
24 concerns of the local community.

25 And we are stating that we are agreeing

1 that because that's useful we would like to
2 provide that prior to the staff assessment. And
3 we will provide that by December 5th. So that
4 they can use that information to include in their
5 supplement to the staff assessment.

6 In the area of biology the first key
7 perspective that I keep having to remind an
8 amazing amount of people, because it's a very
9 unique situation, is this involves the use of an
10 already operational, currently operational and
11 functional intake and out-take structure in the
12 Santa Monica Bay that's been permitted for 40
13 years.

14 In that since the early '60s there have
15 been no changes essentially to intake/out-take
16 structures and entrainment and impingement in the
17 Santa Monica Bay.

18 And that there have been changes
19 obviously in the aquatic community, and in
20 particular, I think, as we will often hear, there
21 are a lot of other influences that affect fish --
22 health in fish populations, such as the discharge
23 of metals into the ocean, and pollution runoff and
24 other concerns.

25 But that primarily one of the features

1 of this project, and one of our intended design
2 characteristics was to design this project so that
3 we qualified as an existing, fully permitted
4 intake structure.

5 One of the reasons that is very relevant
6 is because there is a strong line of argument
7 under CEQA, in addition to the fact that that
8 means that we're automatically fully in compliance
9 under the Clean Water Act and the Porter- Act,
10 because that is the L.A. Regional Water Quality
11 Control Board's authority that isn't delegated.

12 What that also means is that we have the
13 ability, under CEQA, to say that the impacts
14 associated with intake number one, this intake
15 structure that is currently operating at El
16 Segundo generation station, may not even be part
17 of this project.

18 We asserted that in the AFC; and we
19 continue to assert that that may be the ultimate
20 fallback position we have to rely upon. And that
21 is certainly something that is worthy -- I'm not
22 trying to assert as a conclusive legal fact --
23 it's something worthy of legal briefs and legal
24 analysis as to whether or not that is the case.

25 We would much rather, and that's why we

1 provide a tremendous amount of information of
2 interest, and continuing to provide information
3 that will show that even if you take all of the
4 impacts, that intake number one, impingement and
5 entrainment, to the aquatic community, that they
6 do not create a significant impact on their own.

7 The issue of cumulative impacts is much
8 tougher because here the idea of cumulative
9 impacts is you establish a baseline, and then you
10 say what does this project add to that baseline.

11 Right now the existing plant, the
12 existing intake structure is part of a baseline
13 that hasn't changed for 30 years, more than 30
14 years, in terms of impingement and entrainment in
15 the Santa Monica Bay. And we're not talking about
16 adding to that at all.

17 It's been permitted to run 2.1 billion
18 gallons of water per day in the Santa Monica Bay
19 unchanged since Scattergood came on line in the
20 '60s. And that has not changed. And we're not
21 changing that one iota.

22 So, cumulative impacts is a much tougher
23 issue to decide how to handle legally, but it
24 looks even more like the answer there is that for
25 cumulative impact purposes, as long as we don't go

1 above the baseline there is none, and the tougher
2 legal question is whether or not, on an individual
3 impact basis, the impacts of intake number one are
4 considered or not.

5 But, as I said, it's not our goal to try
6 to imply that there are significant impacts from
7 intake number one and we want you to ignore them.
8 We have asserted in our AFC, and we continue to
9 believe, and biologists tell us, that intake
10 number one is a small intake structure; in fact,
11 it is the smallest of all the ones in Santa Monica
12 Bay.

13 It's located in a sandy bottom
14 environment; off the bottom of the ocean. And it
15 is a low impact system. And for those reasons
16 it's just not expected, conceptually and
17 generally, to be a significant contributor to
18 impacts in the Santa Monica Bay.

19 There is another line of thought that
20 the fact that it has been part of an operational
21 system in the Santa Monica Bay for 30 years, that
22 the primary agency responsible, the L.A. Regional
23 Water Quality Control Board, for enforcing the
24 Clean Water Act, which is the primary law we rely
25 upon in the United States to maintain the health

1 of the Santa Monica Bay aquatic communities, has
2 renewed the NPDES permit over the years. And even
3 at this point the L.A. Regional Board is satisfied
4 that our project is in compliance with the law and
5 is fully permitted, not our project, our intake
6 structure.

7 And we have asserted, and we have gotten
8 affirmations that the intake structure is, indeed,
9 qualifies, as we're using it in this project, as
10 an existing intake structure.

11 Now, nevertheless, and as I said, we're
12 determined to try to provide any information we
13 can provide. And we recognize, after we had a lot
14 of dialogue, that there was a lot of confusion
15 about what we relied upon to this date.

16 There's one thing I'd like to clarify,
17 and it's kind of an example of how difficult to
18 manage a lot of projects at once, for all the
19 information about one project, but there was a
20 misstatement early on that we were relying upon
21 data that was 55 miles away, the Ormond Beach
22 generating station. And that is not the case.

23 It is true that the data, one of the
24 data that we're relying upon, is the original
25 316)b) study conducted for this project. And it

1 used data there.

2 Simultaneously Southern California
3 Edison collected data at several locations. And
4 the data that was used for El Segundo was the data
5 right there.

6 So, that argument that it was data that
7 was 20 years old and 55 miles away is completely
8 wrong. The data that was originally used to
9 assess and to permit intake structure number one
10 at El Segundo generation station, the first NPDES
11 permit issued under the Clean Water Act, was data
12 that was collected there.

13 However, it is true that the data was 20
14 years old. And while we believe, and we continue
15 to believe, that the fact that the data is 20
16 years old, for purposes of determining whether or
17 not the project has significant impacts under the
18 California Environmental Quality Act is adequate
19 through a simple series of assumptions.

20 We're determined to try to do any other
21 type of analysis and contribution to and
22 understanding of whether or not the impacts are
23 significant under the California Environmental
24 Quality Act that we can.

25 Another way that we did it is we looked

1 at the fact that Scattergood had very recently
2 done an update study. It didn't involve the
3 collection of new data, but it involved a re-look
4 at the operation of Scattergood, which is
5 immediately adjacent to El Segundo and in a nearly
6 identical habitat. And had submitted this to the
7 L.A. Regional Board in an anticipatory manner to
8 try to provide some new information. And
9 Scattergood has doubled the volume, about 408
10 million gallons per day instead of our 208 million
11 gallons per day when it's running at full capacity
12 for both of them than we have.

13 And so by simple analysis, identical
14 habitat, twice the volume, if Scattergood is not a
15 significant impact to the environment, then we're
16 not a significant impact to the environment.

17 Finally, though, and I noticed that when
18 we initially filed this project there was an
19 attempt, this is what I talk about sometimes, we
20 get used to a certain style and we want to apply
21 that same plan over and over again.

22 And those projects on the coast have
23 required a 316(b) study. That's a Clean Water Act
24 requirement under section 316(b) of the Clean
25 Water Act. And that's because they are new

1 structures, and thus they require a 316(b) study.

2 The dialogue initially was you didn't
3 give us a 316(b) study, and we want one. And we
4 said, well, we don't have to provide you a 316(b)
5 study because we're an existing intake structure.
6 The law doesn't require that because it's not
7 required.

8 That has changed, and more correctly to
9 be that you didn't provide a study, at least a
10 legitimate statement, from the staff, that you
11 didn't provide a study that allows us to assess
12 whether or not the project has significant impacts
13 under the California Environmental Quality Act.

14 In other words, it isn't whether or not
15 we provided a 316(b) study; it's whether or not we
16 provided sufficient information that would allow
17 the staff to conclude whether or not the project
18 has significant impacts. Not that it has a
19 particular level of impacts, but whether or not it
20 has significant impacts to the environment.

21 And that is the correct debate that
22 should be focused on as to whether or not the data
23 that is in the record is adequate or not. And we
24 are determined, if there's a way for us to get
25 more data into the record, we will.

1 For that reason, we've been engaged in a
2 dialogue for quite awhile about some study that
3 would automatically be accepted by the staff. And
4 what we reached the point was we've had a lot of
5 differences. It's a very complex science, as I've
6 learned over the last six to nine months.

7 And thus, we reached a point where we
8 realized we're going to have to take all the input
9 we can and produce a study. And we'll continue to
10 show everyone we can what we're doing, but if we
11 continue a dialogue, we could go on for a long
12 time and never reach a perfect study, a perfect
13 protocol.

14 And so I have tasked our biologist with
15 producing an analysis using surrogate data from
16 King Harbor that will be the best that we can
17 produce of another, yet another means of trying to
18 show that this project does not have significant
19 impacts.

20 We don't think it is the only one. We
21 believe it will be another set of data. And we're
22 going to try, and we're continuing, and my
23 biologists are working as we speak, to try to
24 produce this study to address every issue that we
25 possibly can the best way we can that we've heard

1 inputs from the CEC Staff biologists, and from
2 other people that have commented.

3 And that's our goal. The problem we
4 face at this point is it's not our goal to try to
5 pretend like we're going off and ignoring what
6 people said, but we drew a point where we said, if
7 we're going to get this in, if it's ever going to
8 be part of our record -- other than to just have
9 to fall back on a lot of data about what we've
10 given to this point, and about the legal status of
11 the intake number one and its role in the project,
12 we're just going to have to complete this and get
13 it in.

14 We need to produce copies continuously,
15 but one way or another we have to produce the
16 study.

17 Our original plan was to -- and I
18 indicated in the letter to Commissioner Pernell,
19 or Mr. Varanini did, that we wanted to produce
20 that study prior to evidentiary hearings. I heard
21 a very good defense of that from Mr. Abelson,
22 staff counsel, that if the staff knows that a
23 major chunk of information is going to come in
24 that they can use in their staff assessment, that
25 they want to wait on issuing the staff assessment.

1 Similar to the noise issue, but this is
2 an area where they, unlike noise, where at least
3 on its face the staff assessment is complete, in
4 biology we've had a lot of differences, and the
5 whole idea of trying to predict impacts to do
6 impingement and entrainment studies afterwards,
7 and determine the impacts then, is not only is it
8 not acceptable to the Coastal Commission, but
9 we've never liked that idea, either.

10 We believe that there is enough
11 information for the Energy Commission to determine
12 the impacts of this project now, and make that
13 determination.

14 But, clearly we would like to get the
15 staff as much information as possible. And since
16 we also had a very good noise information, we also
17 are agreeing to get this information in. At least
18 in some form, as much as we can accomplish, by
19 December 5th. And that's why I've got a staff of
20 biologists working furiously so that there will be
21 another piece of information available to the
22 staff when they issue their supplemental staff
23 assessment.

24 If it's not enough for them, that may be
25 where we have to say we've got to move on. But,

1 it's the best thing I can offer and do, given the
2 time pressures and the other schedules that we
3 have.

4 And so don't think that the fact that
5 we're trying to now produce this implies any kind
6 of desire to ignore the input of staff. In
7 reality, it just reflects that it's our only
8 opportunity to get this in. Otherwise, I think
9 Mr. Abelson is correct, given a whole new study
10 and a new piece of information, if we threw that
11 in at evidentiary hearings, it would be a little
12 unfair.

13 And at least we can get it in now so the
14 staff has a chance to look at it in their staff
15 assessment, to prepare their -- then later to
16 prepare their testimony accordingly. And that's
17 what we would like to do with the biology study.
18 And that's kind of why we're doing what we're
19 doing.

20 But, I also think that it may have
21 reached the point where the Committee may want to
22 call for a legal briefing on the status of intake
23 number one. Whether or not its impacts should be
24 part of the project.

25 Because I think that ultimately the

1 Energy Commission may need to make that decision
2 also, to really be comfortable with procedurally
3 what's unfolded. Because if the Energy Commission
4 were able to reach that conclusion, that the
5 impacts of intake number one are not part of El
6 Segundo Power Redevelopment, the AFC, that would
7 be another means of concluding that the project is
8 satisfactory under the California Environmental
9 Quality Act and the Warren Alquist Act.

10 In addition, if the Committee could
11 reach a decision that the project does not have
12 significant impacts under CEQA.

13 Up till now we've kind of maintained
14 that as a fall-back position. But I feel that it
15 perhaps is something that -- the only way you'll
16 be prepared to answer it is if it's briefed. And
17 maybe you won't have to reach a decision on that
18 point, but I would suggest that perhaps it ought
19 to be briefed, so that if you need to, you'll be
20 able to make a decision on that point.

21 HEARING OFFICER SHEAN: Okay, just so --
22 I want to recap this. Originally, your -- I mean
23 you underlying belief is that the intake
24 structures are not part of the project, that
25 they're covered by a valid existing permit. And

1 therefore do not need to be part of our
2 proceeding.

3 However, you have, I guess in your view,
4 volunteered to provide information to staff and
5 other parties to convince them that
6 notwithstanding essentially what amounts to a
7 legal position, that you have a substantive
8 position that supports the idea that there are not
9 potential significant environmental impacts from
10 the use of the intake structure, is that --

11 MR. MCKINSEY: Yeah, but I'd also like
12 to point out that the initial interpretation of
13 the information we provided in the AFC, the
14 statement it was 20 years old, 55 miles away,
15 reflects that there was a misunderstanding about
16 that data as to whether or not it was adequate.

17 And that we also, you know, in addition
18 to convincing this new data is good, we would like
19 to continue to try to show that this information
20 is sufficient for what they're required to do
21 under this project.

22 And at minimum all they're required to
23 do is -- at a maximum all they would be required
24 to do is whether or not there are significant
25 impacts under CEQA. Not compliance with the Clean

1 Water Act.

2 But at a minimum it would be they're not
3 required to do anything. And the information is
4 already in the record, in addition to whatever
5 else we can get in, is adequate to do that
6 maximum, to do significant impacts under CEQA, not
7 the Clean Water Act and whether or not we comply
8 with the Clean Water Act.

9 HEARING OFFICER SHEAN: Okay, because it
10 seems to me that one of the potential effects of
11 how you've approached the validation study is that
12 when it is transferred to the staff, they may feel
13 that whatever your methodology was, as a result of
14 this peer review, is inadequate.

15 Or that if the protocols and methodology
16 were adequate, the data that are there are
17 insufficient and it doesn't support the final
18 conclusion of the study. And we would probably be
19 back basically to where we were in July, if my
20 recollection is correct, of the events at the
21 staff workshop.

22 And then you would refer essentially to
23 what you called your fall-back position, which is
24 that as a matter of law the applicant has
25 supported either the fact it's not part of the

1 project, or I guess there's another possibility
2 which is that it's part of the project, but the
3 existing permit substantively satisfies your
4 burden of proof?

5 MR. McKINSEY: Yeah, the correct way to
6 state it would be that the legal position would be
7 that the impacts of intake number one are not
8 required to be assessed for purposes of the
9 California Environmental Quality Act equivalency
10 under the Warren Alquist Act.

11 That doesn't mean that the intake
12 structure does not become part of the project.
13 And, indeed, a normal condition clearly here would
14 be maintain an NPDES permit. And that's what you
15 see for any project that's using an intake
16 structure.

17 And, like I say, that's a legal debate
18 issue, but that would be that position we would
19 have.

20 I'd also like to say that wouldn't be
21 the automatic fall-back if the study were
22 unacceptable. We would also continue to say in
23 addition to the study this other information is
24 adequate to assess whether or not the project has
25 significant impacts in addition to this new

1 information.

2 HEARING OFFICER SHEAN: Okay.

3 MS. TOWNSEND-SMITH: Is intake number
4 one the only issue between staff and the applicant
5 in this validation study?

6 MR. McKINSEY: The only issue really in
7 the area of biology is intake number one, and
8 whether or not we have provided enough information
9 that allows them to assess whether or not that
10 intake structure has a significant impact on the
11 aquatic environment.

12 HEARING OFFICER SHEAN: And I guess --
13 and Mr. Luster is on the phone, he can answer
14 that. But let me just say, if I understand
15 correctly, what you will be submitting on December
16 5th or thereabouts, you are also attempting to
17 satisfy the Coastal Commission concerns with
18 respect to this matter, as well?

19 MR. McKINSEY: I think the Coastal
20 Commission's position, he should probably say
21 this, but my understanding is that they believe
22 that a full impingement and entrainment study, and
23 I think that's English language for a 316(b) study
24 is required for you to proceed with this project
25 at all.

1 In other words, you can't make a
2 determination until you have a full impingement
3 and entrainment study like all the other projects,
4 except Contra Costa, which was a very similar
5 situation to this project had.

6 And not just the coastal ones, but the
7 bay ones, Potrero and Contra Costa, for instance,
8 are bay ones that are under the Coastal
9 Commission's jurisdiction, but are cases where the
10 Energy Commission has dealt with ocean aquatic
11 marine environments.

12 And so I believe the Coastal Commission
13 feels that it is inappropriate to proceed without
14 an impingement and entrainment study. And at a
15 minimum I've seen in the past where that was cited
16 under 316(b), the Clean Water Act.

17 They may also feel that a full
18 impingement and entrainment study is necessary to
19 evaluate it under the California Environmental
20 Quality Act, which is also what the Coastal Act
21 falls back upon as its basic standard for
22 significant impact.

23 HEARING OFFICER SHEAN: Okay. Mr.
24 Luster, if you're there, can you fill us in?

25 MR. LUSTER: Yeah, I'd be happy to weigh

1 in. Actually, based on what we know now, yes, I
2 think a 316(a) and (b) study would be appropriate.

3 However, we, during the last few months
4 when the applicant proposed something other than
5 that, we went along with Energy Commission Staff
6 to say essentially, sure, come up with something
7 else and we'll review it.

8 And our primary interest is determining
9 what the impacts are. And if there's some other
10 study that can do that, great. If not, the fall-
11 back is the full entrainment/impingement study
12 under 316(b).

13 We haven't seen the alternative study
14 yet, so we can't really weigh in, and until we see
15 that, the fall-back would be 316(b).

16 HEARING OFFICER SHEAN: Okay. And the
17 gentleman from the Water Board, if I understood
18 what was discussed at the staff workshop in El
19 Segundo in July it was that you anticipated the
20 federal EPA promulgating soon regulations for new
21 316(a) and (b) protocols, and that this license or
22 this permit has to be renewed in either 2005 or
23 2006, and would at that point be subject to a
24 study under new protocols.

25 Is that a -- if that's a proper

1 recitation of the history, what would be going on
2 with the Board with respect to that?

3 MR. RIZK: This is Tony Rizk. Forgive
4 me, I had stepped out for a little bit, and I just
5 got back to catch the last five minutes -- I mean
6 five seconds.

7 HEARING OFFICER SHEAN: Okay.

8 (Laughter.)

9 HEARING OFFICER SHEAN: I'm not sure
10 that it was you, but someone at the --

11 MR. RIZK: I heard the word reports --

12 HEARING OFFICER SHEAN: James Reede is
13 nodding yes, it was you, at the July staff
14 workshop indicating that the feds ar changing the
15 316(a) and (b) regulation protocols on you likely
16 prior to the renewal point of this permit, is that
17 correct?

18 MR. RIZK: That is correct. In February
19 of 2002 the USEPA plans to issue new guidelines
20 for 316(a) (b) studies. And the Regional Board
21 intends, upon the issuance of those guidelines, to
22 go through not only the El Segundo power plant,
23 but all nine of our ocean discharging power
24 facilities in the Los Angeles region, and assess
25 whether based on the new guidelines from the

1 USEPA, whether these facilities do meet the EPA
2 guidelines.

3 And for not knowing what the guidelines
4 are, it's difficult to predict what level of
5 studies would be required by the El Segundo power
6 plant. However, once these guidelines do come out
7 our intent is to go to the, as we always do, to
8 the maximum extent of our authority and to require
9 any and all studies which would/may include, of
10 course, 316(a) (b) study of the El Segundo power
11 plant.

12 One thing that is worth noting at that
13 time, one of the items that would be issued by the
14 USEPA is a guideline on the protocols, the
15 procedures that would be applicable in doing
16 316(a) (b) study. Thus, our intent at that time is
17 also to require a new study, or require some
18 aspects of new studies, that would be in full
19 compliance of the new protocols and guidelines by
20 the EPA on how to conduct these studies.

21 Thank you.

22 HEARING OFFICER SHEAN: Thanks. Do you
23 know enough about these new guidelines to tell us
24 whether or not a 316(a) or (b) study performed
25 under the, I'll call them existing or old

1 guidelines, would satisfy the new guidelines?

2 MR. RIZK: Unfortunately, no. We have
3 had discussions with the USEPA, we're being told
4 things here and there. But, nothing that we can
5 formulate any preemptive, so to speak, policy
6 toward El Segundo or any of the power plants.

7 One thing worth noting is that the EPA
8 is under a consent decree to issue those
9 guidelines. The EPA is required to issue the
10 draft guidelines in February of 2002, with the
11 guidelines being promulgated by the end of the
12 year 2002.

13 Thus our approach, one year is what we
14 need to have in order to determine for that
15 maximum -- or minimum, I mean, six months, because
16 even once you get a draft guideline in February,
17 depending on the intervenors and the kind of
18 comments you receive, all of the EPA will resist
19 making a major changes, they may be major changes.

20 But I would submit that a minimum of six
21 months, more likely one year before we know
22 whether not only the guidelines, but also what
23 would be the protocol that would be critical in
24 conducting the study to insure compliance with the
25 guidelines.

1 And for what it's worth, it is at that
2 point where -- and this is a public
3 announcement -- we urge everyone to, on this
4 teleconference and others, especially the specific
5 area, to read the draft guidelines and provide
6 comments to the EPA.

7 Thank you.

8 HEARING OFFICER SHEAN: Thank you.

9 MS. TOWNSEND-SMITH: Was there a list of
10 deficiencies established at the November 2nd
11 meeting for the protocol? I mean was the
12 applicant given like a list of deficiencies that
13 they needed to complete the validation study?

14 MR. ABELSON: The biologists are here
15 and can speak to the merits, but I think this is
16 primarily a process question that you're asking,
17 and the answer is yes. There was a lengthy
18 discussion, I think, of what concerns our
19 scientists have. In fact, I think all parties
20 involved in that meeting felt it was a very
21 constructive meeting.

22 And I take Mr. McKinsey at his word that
23 they now have what information they can use, given
24 the time that's left. They're going to do the
25 best that they can, and that may be good enough,

1 or it may not, in staff's view. And, of course,
2 the Committee might well differ with staff once
3 they hear the respective positions on the issue
4 again at the trial.

5 We did hope at one point that we could
6 dovetail the process with the 316(a) and (b) work
7 that's going on at EPA, so that hopefully
8 duplication could be avoided by everybody.

9 But as Mr. Rizk has explained, those
10 draft regs, and they are just that, drafts, aren't
11 even coming out until February. So,
12 unfortunately, we're going to have to go, you
13 know, ahead with the best science that the record
14 can produce.

15 And I believe that the applicant is
16 aware of the type of concerns that we have, and is
17 now striving as best as they can to meet those,
18 and we'll see what they produce on the 5th of
19 December.

20 MS. TOWNSEND-SMITH: Okay, because it
21 seems pretty obvious that we can't wait for -- we
22 can't work with the guidelines, since no one's
23 sure exactly what's going to be required.

24 So we already have a program, the
25 validation study, which can be used for the

1 biologists?

2 MR. ABELSON: Well, it's clear that the
3 applicant, number one, believes that existing
4 information in the record is enough to show no
5 significant impact.

6 It is clear that the applicant
7 understands the concerns of staff, and perhaps
8 other parties, the Coastal Commission and
9 elsewhere, have about that existing information.

10 It is clear that the applicant is
11 prepared, and in fact has devoted significant
12 resources to augmenting or supplementing that
13 information and further explaining it to help
14 everyone, the decision makers included, to
15 understand why they believe there is clear
16 evidence of no significant impact.

17 That information will be finalized, as I
18 understand it from Mr. McKinsey, around December
19 the 5th. And that will be submitted. And then
20 will undergo the peer review.

21 Staff will review that, and we may or
22 may not find it to be acceptable. I think that
23 that's an open question. But regardless of what
24 we find, we will then have a complete record that
25 is, at that time, then ready for litigation on the

1 issue, if still there's differences between the
2 parties.

3 What the Committee will do, whether it
4 would side with staff on the bottomline, or
5 whether it would side with the applicant, of
6 course, no one knows at this point.

7 MS. TOWNSEND-SMITH: And basically for
8 staff to make a determination if this study is
9 acceptable, is it based on intake number one?

10 MR. ABELSON: No. The study definitely
11 has to do with the effects, the impacts of intake
12 number one, there's no question about that.

13 MS. TOWNSEND-SMITH: So, no matter what.
14 Okay.

15 MR. LUSTER: This is Tom Luster, again.
16 May I weigh in briefly on the role of the intake
17 and outfall in this proposal? Is this a good time
18 for that?

19 HEARING OFFICER SHEAN: Go ahead,
20 please.

21 MR. LUSTER: Okay, thanks. I want to
22 add to the applicant's description of the proposal
23 and the role of the intake and outfall.

24 One concern we have, while we agree that
25 the intake and outfall structures are not going to

1 be changed, however the operational
2 characteristics of the plant are changing. And
3 one of our concerns is what exactly is the
4 baseline condition that we would compare existing
5 conditions with the proposed conditions for an
6 effect on entrainment and impingement.

7 It appears that over the last at least
8 during the review period for this proposal, and it
9 looks like for some time before that, the actual
10 existing use of the facility of intake water is
11 much lower than that permitted amount.

12 And we're requesting that pursuant to
13 CEQA guidelines that the actual existing
14 conditions present at the time of environmental
15 review be used, rather than some theoretical set
16 of conditions, to determine entrainment/
17 impingement impacts.

18 While the facility has been permitted to
19 use a little over 200 million gallons per day,
20 actual use has been far lower than that. And
21 apparently the existing units, units one and two,
22 at the power plant, haven't really been maintained
23 to use that maximum amount for a number of years.

24 And so because the Coastal Act looks at
25 changes in intensity of use as part of our overall

1 review, we think that the water use in the plant
2 going from perhaps -- at some point zero gallons
3 per day to perhaps up to 50 percent of its
4 theoretical maximum permitted use, a change from
5 those levels to a more steady state, 200 million
6 gallons a day plus, would result in, for instance,
7 a 50 percent increase or more in entrainment and
8 impingement impacts.

9 And we would want that to be evaluated,
10 as well, as part of the overall proposal. So, in
11 our perspective the intake and outfall structure
12 are clearly a part of the proposal. Because
13 without those operational changes, the proposal
14 would not be happening.

15 MS. TOWNSEND-SMITH: So the lower the
16 water the higher impingement and entrainment?

17 DR. DAVIS: That's correct.

18 MS. TOWNSEND-SMITH: Okay, now I have
19 somebody shaking their head no, and you're saying
20 yes.

21 MR. LUSTER: The higher the water use --
22 the more water --

23 MS. TOWNSEND-SMITH: The lower the water
24 use.

25 MR. LUSTER: Well, the more water that

1 goes through the intake and outfall structures,
2 the higher rate of entrainment and impingement.
3 Over the last several months, and perhaps several
4 years, according to partial information I've
5 received, water use has been much lower, from zero
6 gallons a day to 103 million gallons per day.

7 The proposal would take that up to more
8 of a steady state, 200 million gallons a day plus.
9 And so you would have an increase in the rates of
10 entrainment and impingement, I assume
11 approximately proportional to the increase in
12 water use.

13 MS. TOWNSEND-SMITH: So you're assuming
14 50 percent increase?

15 MR. LUSTER: Well, I'm not sure, I don't
16 have the complete records of water use over the
17 years. The five monitoring points I found during
18 several sampling events from 1997 to 1999 showed
19 flows of from zero to 50 percent of the potential
20 allowable flows under the NPDES permit.

21 And so somewhere between a 50 percent to
22 100 percent increase in entrainment and
23 impingement could occur if the proposed operation,
24 the more steady state operation at 200 million
25 gallons a day plus occurs.

1 MS. TOWNSEND-SMITH: Thank you.

2 MR. PERKINS: Excuse me, this is Bob
3 Perkins. I think that was Mr Shean speaking, but
4 those of us on the phone are having trouble
5 tracking. Would you folks do your best, please,
6 to keep using your names?

7 HEARING OFFICER SHEAN: Okay. Right now
8 that was Mr. Luster from the Coastal Commission.

9 MR. PERKINS: Thank you.

10 HEARING OFFICER SHEAN: All right, Mr.
11 McKinsey, why don't you keep --

12 MR. McKINSEY: I just wanted to indicate
13 that a lot of what Mr. Luster's getting into I
14 think involves a legal analysis.

15 That's why I was saying it may be
16 necessary to really ask for a legal briefing on
17 the intake structure and the extent to which its
18 impacts are part of the project.

19 Because a lot of the issues he's hitting
20 on are the issues that are in the case history
21 under what it means when you have a permit and the
22 permit has got one level, the use has been this
23 level, and vice versa. And it's a legal issue
24 that could be a tough egg to crack unless you
25 prepare for it adequately in advance.

1 MR. LUSTER: For reference, if you have
2 a copy of --

3 HEARING OFFICER SHEAN: This is Mr.
4 Luster again.

5 MR. LUSTER: Thank you -- the Coastal
6 Commission Staff letter from October 4th, on page
7 5 we go into this discussion on baseline
8 conditions.

9 One of the examples we use is a previous
10 Energy Commission ruling regarding the Morro Bay
11 power plant review where the staff wanted to use a
12 theoretical condition that presumed that the
13 existing plant was not there, essentially a
14 theoretical natural background conditions.

15 And the Energy Commission said no, the
16 plant is there. The actual existing conditions
17 are what we should compare their use as our
18 baseline comparison.

19 This is very similar in that even though
20 there's a theoretical maximum use of water
21 allowed, that water use apparently has not
22 occurred for a number of years. And so the actual
23 existing conditions should be based on a somewhat
24 significantly lower amount of water use. And
25 therefore, a lower existing level of entrainment

1 and impingement.

2 MR. ABELSON: Mr. Shean, if I could just
3 comment very briefly on scheduling issues related
4 to the possibility of legal briefing on this one
5 issue.

6 I don't disagree with Mr. McKinsey about
7 the need, at an appropriate time, that's the only
8 issue in my mind, to brief the legal question. I
9 would submit respectfully that I think we should
10 be cautious about when that's done, the timing of
11 the staff, the timing of the Committee, and the
12 timing of the applicant, as well.

13 It's clear the applicant intends to
14 supplement and augment. They've offered to do
15 that and they intend to do that.

16 As a result of that supplementation
17 there are several possibilities that flow from
18 that. One is that the staff evaluates it, and
19 while we may have some view that perhaps there's a
20 better or perfect way to analyze the document,
21 that what has now been submitted suffices.

22 At which point, at least between the
23 staff and the applicant, the issue of legality is
24 now moot as a practical matter.

25 The second option is staff continues to

1 find serious deficiencies, as a technical and
2 factual matter, in the revised biological study.
3 That is staff's position. The applicant will
4 obviously disagree with that. And the Committee
5 will have to make a decision on the evidence as to
6 whether it supports the technical view that staff
7 or other parties are taking, or whether it favors
8 the position that the applicant is taking on that.

9 If it were to decide in favor of the
10 applicant, which is certainly a possibility, the
11 legal issue is a moot point at that time.

12 The point that I'm getting to is that
13 because the legal issue ultimately is something
14 the full Commission will have to resolve, because
15 it actually is going to be probably a major matter
16 first impression for this agency, and because
17 there are any number of avenues which may render
18 that issue academic or moot, I would suggest that,
19 to the extent that it be addressed, it be
20 addressed in reserve. And we try to deal with the
21 factual situation as best as we can, and then if
22 necessary, the legal issues will present
23 themselves timely down the line.

24 HEARING OFFICER SHEAN: Okay. I've
25 attempted to give this some advanced thought, and

1 at one point I was thinking that it needed to be
2 addressed preliminarily because it would dictate
3 whether or not either -- let me say this.

4 If there was not substantial
5 satisfaction by staff and the other parties with
6 this new study, then the issue of whether or not
7 legally the applicant was required to come forth
8 with more information would depend upon a ruling
9 on the legal issues.

10 That seems like, well, if there were a
11 large study that would have to be done, if the
12 ruling were against the applicant, then it would
13 be imprudent to gear up a process that got into
14 evidentiary hearings and everything else. And
15 that has a certain appeal.

16 But it appears that, and I'm going to
17 ask the applicant, essentially if you had to go to
18 evidentiary hearings on this you would be doing it
19 substantively with this validation study. And
20 maybe a little bit of more information tacked on
21 it. But essentially approaching it in the
22 alternative, either that you didn't have to do
23 anything other than state your legal position, and
24 that's plan A. And plan B would, but nonetheless,
25 here's the information that the applicant's

1 willing to provide that we think supports the
2 substantive view of no substantial impact.

3 MR. MCKINSEY: Correct, and Mr.
4 Abelson's assessment was pretty accurate, except I
5 would be concerned that any party to the
6 proceeding would have the ability, if we don't
7 make the legal argument in the evidentiary
8 hearings, and carefully make it, could assert that
9 they are dissatisfied with the amount of data
10 that's been presented. Or that they feel the data
11 shows an insignificant, or significant impact.

12 And if they're in those kind of states,
13 then the -- and we didn't actually brief the legal
14 argument that the project -- if we didn't include
15 that, and continue to include that as part of the
16 project, then we might surrender it.

17 So if we didn't have resolution from
18 every party, we would need to brief it in the
19 evidentiary hearings to at least include it as a
20 continuing issue. It may not have to be fully
21 developed, but we would need to continue to keep
22 it as part of our --

23 HEARING OFFICER SHEAN: Sure, and
24 potentially that's the Coastal Commission, CURE,
25 or perhaps the residential intervenors. Okay.

1 MR. ABELSON: Mr. Shean, all I'm
2 suggesting is I think that that briefing, if it
3 becomes necessary, probably isn't timely until
4 near the end of the hearings, as part of sort of
5 wrapping up. And then submitting briefs, both on
6 the record and on the law, as long as it's clear
7 that the applicant has reserved this issue, and
8 made it clear that they intend to reserve that
9 issue, which we would certainly stipulate to.

10 HEARING OFFICER SHEAN: Sure. Okay.
11 We've beaten this dead horse.

12 MR. MCKINSEY: Visual. This is an area
13 where I said that perspective about the role of
14 the Coastal Commission is important to keep,
15 understanding the Energy Commission and the
16 Committee will be tasked with deciding the issues
17 involving any provision of the Coastal Act.

18 In the input of the Coastal Commission
19 is very important to that. But ultimately, the
20 Warren Alquist Act requires that the Energy
21 Commission consider a provision of the Coastal
22 Act, whether or not it requires certain conditions
23 as part of LORS compliance.

24 And the debate here is over whether or
25 not the California Coastal Act has a provision

1 that under some circumstances can require not just
2 avoidance of significant impacts, but actual
3 enhancements be completed.

4 And I think that essentially we have a
5 difference of opinion on whether or not that is
6 the case. And the discussion of whether or not we
7 have any other data obligations in order for the
8 staff to complete its assessment would be whether
9 or not there was some information we hadn't
10 provided that they felt was necessary to determine
11 whether or not the project did, indeed, qualify,
12 using all the requirements and meeting all the
13 necessary findings for visual enhancement.

14 Now, what came up in the dialogue and I
15 think it was correctly described by Mr. Reede is
16 we had provided an original assessment of the
17 project, and we were asked by the Energy
18 Commission to make it look more industrial. And
19 so we provided the most industrial look that we
20 could. And we prefer to have that be the
21 assessment perspective on the project, so that it
22 is worst case.

23 And so that if you use the renderings
24 that show as much of the industrial look of the
25 facility as possible, but that will be the basis

1 for first of all determining whether or not there
2 are significant impacts under CEQA, which is not
3 really at issue.

4 Instead what is at issue is a LORS
5 compliance issue whether or not the replacement of
6 the existing units of one and two with these new
7 proposed units five, six and seven, are something
8 that requires an enhancement, and that proposals
9 that other parties, such as the Coastal Commission
10 and the Energy Commission are making would
11 require. Such as putting up a siding type of, in
12 other words enclosing it in some type of visual or
13 architectural treatment, which is the equivalent
14 of kind of putting siding on the project.

15 And that is a tough issue, but I don't
16 believe that there is anything at this point that
17 requires further action for this to be able to
18 move to evidentiary hearings.

19 There's still some possibility we may
20 find common ground. But in terms of for
21 scheduling purposes I don't see that there's
22 anything that should be invoked into our schedule
23 regarding this issue. It will end up being
24 something as part of the prehearing conference,
25 and the evidentiary hearings to the extent to

1 which parties want to engage in this, or whether
2 or not they reach an area where they have a mutual
3 agreement, which is still a potential, but I don't
4 see that it's necessary to hold up evidentiary
5 hearings.

6 HEARING OFFICER SHEAN: Let me just get
7 a clarification. First of all, even under the
8 Coastal Commission's interpretation of this, would
9 that involve existing units three and four?

10 MR. McKINSEY: Well, this gets into a
11 scene, three and four are not part of this
12 project.

13 HEARING OFFICER SHEAN: I understand
14 that.

15 MR. McKINSEY: So, in theory, no. In
16 fact, it would only involved the project and
17 whether or not it's required to provide
18 enhancements which --

19 HEARING OFFICER SHEAN: Okay, --

20 MR. McKINSEY: -- wouldn't even
21 necessarily have to be on the project. But
22 overall we'd have to provide enhancements to the
23 region based on a determination that the region is
24 visually degraded --

25 HEARING OFFICER SHEAN: Is that the

1 region or the applicant's site, the property?

2 MR. REEDE: The site.

3 MR. McKINSEY: Well, it refers more to
4 the region in the provision of the California
5 Coastal Act. But, you know, it could be in theory
6 that there's nothing in the case history -- that
7 says that the enhancements can't be done in a
8 variety of flexible ways, once there's
9 determination that the project must provide
10 enhancements.

11 HEARING OFFICER SHEAN: Well, okay, I
12 guess what I'm trying to determine is we do our
13 CEQA visual impacts analysis. And attempt to then
14 determine how we can minimize the visual impact.

15 And to some degree, what some people
16 consider enhancement other people frankly consider
17 a worsening of the visual appearance. And that's
18 something that the Committee often has to grapple
19 with and attempt to get a community consensus on,
20 what the heck they would like to see.

21 That's pretty easy when you're out, you
22 know, doing a Proctor and Gamble or a Campbell's
23 Soup, and you have people in the surrounding area.
24 They tell you what they want. And then local city
25 or country tells you what their practices are,

1 too.

2 Now, I guess the question is whether or
3 not whatever we would do with regard to the visual
4 impacts of the new units, if I understand you
5 correctly, don't capture the enhancements that the
6 Coastal Commission may desire, is that --

7 MR. McKINSEY: No, our understanding is
8 it's not a matter of impacts, it's a matter of
9 insuring that the project has a net positive.

10 In other words, normally the standard is
11 avoid significant impacts to the environment.

12 HEARING OFFICER SHEAN: Um-hum.

13 MR. McKINSEY: In this case some of the
14 parties believe that this provision of the
15 California Coastal Act applies in the
16 circumstances, and changes the standard. So that
17 instead of having to avoid significant impacts,
18 this project has to insure that it is a net
19 positive enhancement.

20 So the standard goes away from being
21 impacts to deciding whether or not the project is
22 a net enhancement or not to the --

23 MR. ABELSON: Mr. Shean, if I could just
24 clarify briefly, and then ask Mr. Luster if he has
25 any additional to add.

1 What Mr. McKinsey just said is correct
2 from the standpoint of staff. This is not, in
3 this case, a CEQA issue. This is a case of what
4 is required under LORS compliance because this
5 particular facility happens to be located in the
6 California coastal zone, and therefore subject to
7 the California Coastal Act.

8 There is a very specific provision of
9 that Act. We have a lengthy lengthy letter from
10 the Coastal Commission detailing their conclusion
11 that that condition which is being described as an
12 enhancement when you're seeking a new permit for a
13 facility in the coastal zone that's in a visually
14 degraded area. That that requirement does apply
15 to this case, and that the proposals that the
16 applicant have made to date do not satisfy that
17 requirement.

18 I would like to make one other brief
19 comment, and then I think this is really Mr.
20 Luster's issue, if you have questions, Mr. Shean.

21 And that's that on the question of
22 timing with the Coastal Commission, I think the
23 record should be clear. We have a lengthy
24 detailed filing that reflects the Coastal
25 Commission Staff's view of this issue.

1 I don't personally have reason to think
2 that the Coastal Commission is likely to differ
3 with that. But we do not have the Coastal
4 Commission's input as to what its view is of its
5 LORS that Mr. McKinsey correctly states we are
6 responsible ultimately through the Energy
7 Commission for enforcing.

8 So it would be desirable in some version
9 on this issue and perhaps on others as well to
10 have an official Coastal Commission position, and
11 that goes to a point that he raised early in his
12 presentation.

13 MR. PERKINS: This is Bob Perkins again.
14 Many of the intervenors, including myself, I think
15 have comments on this and some other issues. Is
16 it appropriate for us to just wait until it's our
17 turn?

18 HEARING OFFICER SHEAN: If you have
19 something you can chime in now.

20 MR. PERKINS: I'll comment that at least
21 from my perspective, and I think from that of many
22 of the residents of Manhattan Beach, and I can't
23 speak for the City, itself, we agree, enhancement
24 can take place in a number of ways. And one of
25 the ways that it can is landscape architectural,

1 as well as physical architectural.

2 And that one of the issues that's been
3 before this Commission forever is how good or
4 ratty the south end of the project will look. And
5 making it look better might be a way of achieving
6 compliance, at least in my view, with the Coastal
7 Commission's requirement.

8 I might also add, since this is a
9 scheduling meeting, that that has impact on
10 scheduling because in a timely fashion back in
11 July, beginning on July 3rd, we served data
12 requests addressing the beauty or ugliness of the
13 south end of the project. And those were -- there
14 was a considerable delay by the applicant in
15 responding to those.

16 There were timely objections made to
17 some and no timely objections made to others. And
18 we've had a conference where we agreed that we
19 would postpone any legal action regarding their
20 nonresponsiveness until they got around to
21 answering them. And they got around to answering
22 them sometime after -- we received them after
23 November 5th, though I think they're dated
24 November 5th.

25 So, we've had those for a couple of

1 weeks. And we do not consider those responses
2 totally satisfactory, although that probably
3 deserves a workshop or similar kind of treatment
4 as to which ones we think, at least, I don't know
5 what our legal standing is to require this, but I
6 can tell you we're not late with it because we
7 have had that agreement with the applicant. We
8 just may lack standing to do it.

9 We think that further information should
10 be provided in that regard. And essentially it is
11 that more landscaping would be appropriate for
12 this project whether or not the Coastal Act
13 requires it. But we also believe that the Coastal
14 Act does require it. And that the information
15 provided so far would not give the Commission the
16 information they need to assess that.

17 I have comments about noise, as well,
18 but I'll let those go. Michelle Murphy wishes to
19 comment for a second, and I'll let those go for
20 the time being.

21 MS. MURPHY: I was just shocked to hear
22 Mr. McKinsey say that three and four do not have
23 to be enhanced. This is an issue we've gone over,
24 I think, several times in the past nine months.

25 From where I'm sitting right now, I look

1 out of my window and I see no power plants, I hear
2 no power plant. When this project is over I will
3 see a power plant and I will hear a power plant
4 because the tanks will be down.

5 That requires, I think, that three and
6 four be considered and possible enhancement of
7 three and four be considered as part of this
8 project. I thought that was well settled.

9 I've a couple more sort of civilian
10 remarks. Mr. McKinsey was talking about the
11 severe shortage of PM10 credits, which I'm not
12 quite sure of. But that even -- I sort of know
13 what that means. But I'm afraid that people with
14 too much expertise in this area are forgetting
15 that from the civilian point of view, it's not a
16 shortage of PM10 credits, it's a shortage of clean
17 air in L.A. County Basin; clean air for the men,
18 women and children that live here to breathe.

19 And whether or not the -- helps that
20 breathing problem is more important than credit.

21 Similarly there was discussion that for
22 30 or 40 years they've been doing the same kind of
23 entrapment and impingement sorts of things. I'd
24 just note that 50 or 60 years ago they were
25 pouring raw sewage into the Bay. It's been done

1 for a long time. I hope it's not the law and the
2 issue that therefore they get to keep doing
3 whatever they were doing 50 years ago.

4 That's all.

5 HEARING OFFICER SHEAN: Okay.

6 MR. REEDE: Excuse me, Hearing Officer
7 Shean, you were going to have Mr. Luster weigh in
8 on the visual degradation?

9 HEARING OFFICER SHEAN: If he has any
10 comments.

11 MR. LUSTER: Sure. This is Tom Luster.
12 I want to briefly before I jump to the specifics
13 of visual a little bit more about the process and
14 the relationship between the Energy Commission and
15 the Coastal Commission.

16 Basically section 25507 of the Warren
17 Alquist for projects in the coastal zone, the
18 Energy Commission shall forward information to the
19 Coastal Commission for its review.

20 Our Coastal Act includes a section
21 saying that we shall submit a report with our
22 findings for the Energy Commission's review. And
23 the Energy Commission's final written report is
24 to -- shall include those provisions unless the
25 Commission specifically finds that our

1 recommendations would result in greater adverse
2 environmental impact, or that they are not
3 feasible.

4 So that's why we're involved in this
5 case. We're required to provide this report for
6 your consideration.

7 One of the concerns that we've raised
8 about the lack of information and the inability to
9 make a finding of conformity with the Coastal Act,
10 the various aspects of the Coastal Act that we're
11 reviewing, for the Energy Commission to find
12 differently than the Coastal Commission based on
13 that same inadequate information I imagine would
14 be quite difficult.

15 So that's part of the reason we're
16 interested in getting the information we need. I
17 believe it's the same sort of level of information
18 the Energy Commission would need to make its
19 decision. So that's just a bit of background on
20 the process.

21 Regarding the visual component here, the
22 Coastal Act has a specific section on visual and
23 aesthetic impacts in the coastal zone, essentially
24 sets up four different criteria:

25 Permitted development is to be sited and

1 designed to protect views to and along the ocean
2 and scenic coastal areas.

3 The development is to minimize the
4 alteration of natural land forms. It's to be
5 visually compatible with the character of the
6 surrounding areas.

7 And in visually degraded areas, and
8 where feasible, the development is to restore and
9 enhance visual quality.

10 So there are actually four different
11 tests to be met of any development proposed in the
12 coastal zone.

13 The letter of October 4th that I
14 referred to earlier, I go into a little more
15 detail on each of those steps. And include a
16 discussion on the whole -- that the finding we
17 made of yes, this is a visually degraded area, the
18 basis for that. And then the need to identify
19 feasible measures that would help restore or
20 enhance visual quality.

21 And then that gets us back into the need
22 for information from the applicant hopefully on
23 what are feasible measures that are available.
24 And that's one of the things we requested.

25 Absent that information I know that the

1 Energy Staff in the staff assessment has a couple
2 of proposed conditions that from our perspective
3 right now, based on the information available,
4 they appear to be measures that would result in
5 likely eventual visual enhancement of the
6 facility.

7 And barring any new information we would
8 want to see at least those proposed conditions
9 take effect. These are VIS1 through VIS5 in the
10 staff assessment.

11 So we've done the analysis; we've made
12 our determination; and went into some detail about
13 the facility's location, the impact on coastal
14 land forms, it's intrusion onto the beach, the
15 general character of the surrounding area.

16 And we believe that additional visual
17 enhancements are appropriate in this case, beyond
18 what the applicant has shown us to date.

19 As an alternative, if we had more
20 information about what might be feasible or
21 infeasible, and I realize that measures -- those
22 types of measures would exist along a continuum,
23 going from very minimal changes in landscaping,
24 perhaps, to completely cladding the facility in
25 something. And there would probably be many steps

1 in between that. But we haven't really seen an
2 adequate portrayal of what feasible measures are
3 being considered, or could be available in this
4 case. And that's one thing we'd like to see.

5 Absent that, at the very least, go with
6 the proposed conditions in the staff assessment.

7 MS. TOWNSEND-SMITH: So without
8 additional information those conditions of
9 certification satisfy the Coastal Commission?

10 MR. LUSTER: No, I wouldn't say they
11 satisfy it. I'd say they are definitely steps in
12 the right direction. Our main concern is that we
13 don't have any idea on what is feasible. In other
14 energy projects lately that weren't in the coastal
15 zone, feasible measures, just based on cost, I
16 don't have the figures in front of me, but a
17 certain percentage of the overall project cost was
18 reflected in visual enhancement measures.

19 Should we apply that same approach here,
20 or is there a better metric to consider. Haven't
21 really seen, other than, you know, the proposed
22 changes in landscaping. Are there measures beyond
23 that that would still be considered feasible
24 enhancements.

25 MR. REEDE: Mr. Shean.

1 HEARING OFFICER SHEAN: Yes.

2 MR. REEDE: There was a report from the
3 Federal Energy Regulatory Commission docketed a
4 couple months ago that related to El Segundo's
5 down time, and the high incidence of salt water
6 intrusion causing problems.

7 Now, the architectural screening, as
8 I've discussed with the applicant's attorney,
9 would prevent a lot of the downtime, especially if
10 they do not intend to include architectural
11 treatment in their scheme of things, so to speak.

12 What the Federal Energy Regulatory
13 Commission stated was because it's right there on
14 the coast, right there on the beach, salt water
15 spray was causing the plant to break down on an
16 ongoing basis. Which addresses the issue of
17 reliability.

18 Now, if that architectural treatment was
19 there it would preclude a lot of the potential
20 down time down the road.

21 Now, one of the things, and I and Mr.
22 Luster spoke, as did our visual impact folks. And
23 Mr. Luster, in his letter, stated that the
24 approximate cost was 2.5 to 3.5 percent of the
25 Metcalf project and the Russell City. But those

1 were enhanced to the 100 degree.

2 We're not talking about 100 degree of
3 enhancement. When we costed it out we were
4 looking at a range of \$300,000 to \$800,000, which
5 is highly economically feasible for architectural
6 enhancement which is one of the tests of the
7 Coastal Commission's visual enhancement.

8 Are the measures feasible. From an
9 economic perspective staff has concluded, even
10 though we haven't written it in our supplement
11 yet, that, yes, it is economically feasible. Will
12 it improve the visual degradation of that region
13 that encompasses the site, we feel it will.

14 We have asked the applicant to provide
15 us additional architectural treatment. The
16 applicant has told us that rendering number two,
17 which is jokingly called the Star War Guts plant,
18 is a significant visually degrading rendering.

19 And so staff stands by its conditions of
20 certification, that there be architectural
21 treatment to improve the visual quality of the
22 region that we consider inside the plant's
23 envelope.

24 HEARING OFFICER SHEAN: A lot of this is
25 going to the substance. I guess the question is

1 whether or not there are information needs that
2 are required, or whether or not --

3 MR. ABELSON: Can I make one other point
4 on the process point, because I agree with you
5 that we really shouldn't be litigating the merits
6 of it at this point.

7 I guess I think that what I understand
8 Mr. McKinsey to be saying is that they understand
9 the position that the Coastal Commission Staff and
10 perhaps the Commission, itself, takes with regard
11 to its law.

12 And that for whatever legal or technical
13 reason they simply are going to choose to stand on
14 the unvarnished project that they presented.

15 And I guess if that's the case, there
16 really isn't any more information to be presented.
17 But unless this Commission and this Committee were
18 going to make a determination that the Coastal
19 Commission doesn't understand its own law, and/or
20 that this Commission is going to override that
21 determination, it's only going to override it if
22 it determines there's no feasible option for
23 enhancing the project. That's the definition, in
24 part, of override.

25 So, what I've been struggling with is I

1 sort of sense that the applicant wants to just say
2 the case is ready, if the Commission makes us
3 enhance we'll enhance. And if they don't, then
4 we're done.

5 But I do think that the question Mr.
6 Luster is toying with in his comments, which is
7 well, what's feasible, folks. Can you at least
8 give us some idea of what you're prepared to
9 submit and live with that you view as feasible.
10 Is the answer -- I mean if the applicant's
11 position, Mr. Shean, is that nothing is feasible,
12 any additional cost of one dollar and one flower
13 is infeasible, then they should say that, and we
14 can litigate that issue, and that's fine.

15 I don't think that's their position, so
16 the challenge for you and for the Committee is at
17 what point is this issue going to become ripe.
18 And I think simply saying well, we're going to
19 stand on the fact that there is no legal
20 obligation under the Coastal Act for us to do this
21 begs questions that are going to have to be
22 answered as part of that.

23 So, back to you, but --

24 HEARING OFFICER SHEAN: I think we
25 understand that. Okay. Let's go to the next

1 topic. Yes, sir, did you want to speak?

2 MR. OCHS: Hi, I'm Paul Ochs, a
3 landowner in the area, O-c-h-s. In addition to
4 the visual enhancing, which I also consider very
5 important. And correct me if I'm jumping the gun
6 and --

7 HEARING OFFICER SHEAN: You're fine.

8 MR. OCHS: -- I'm not bringing up a
9 topic that --

10 HEARING OFFICER SHEAN: No, you've
11 patiently sat there.

12 MR. OCHS: -- shouldn't be included
13 right now, but I also have a concern about the --
14 I mean street sweeping is fine to keep, you know,
15 to clean streets, but it seems to me that there
16 should be some monitoring done during the
17 construction and the demolition of the tank farm
18 to keep the dust down, for instance, to keep it in
19 the spot, whether it's wetting down and those
20 kinds of things, because there's a long line air
21 flow where the ocean is taking it to those homes
22 right in the area, right above the place.

23 As well as, you know, if there's night
24 work being done, is there going to be monitoring
25 of the sound at night, as well as suggestions

1 about how to keep the light down on the site,
2 rather than having it go, you know, reflecting up
3 to the homes and what-have-you, and every night
4 and every day seems like -- I mean there doesn't
5 seem to be that much night.

6 For instance, the Standard Station
7 that's right in the area that does work for the
8 community, cooperates with the community, I think,
9 quite a bit. I think they turn off their main
10 lights, I'm not sure if it's 10:00 or 11:00, but
11 in other words, their big lights, you know, are
12 tamed down at a reasonable hour.

13 So I just think that whether there
14 should be an onsite person to just monitor the
15 best way of minimizing, whether it's air, light,
16 or --

17 HEARING OFFICER SHEAN: Noise.

18 MR. OCHS: -- you know, noise
19 pollutants.

20 HEARING OFFICER SHEAN: Okay, I just
21 want to indicate --

22 MR. REEDE: We've addressed those --

23 HEARING OFFICER SHEAN: -- we have --

24 MR. REEDE: -- particular issues already
25 in the conditions of certification.

1 HEARING OFFICER SHEAN: Sure. We have
2 pretty much standardized conditions of
3 certification that address both dust during
4 construction; also construction noise; also to
5 some degree construction lighting. Although we
6 are generally guided by what is required for the
7 safety of the workers onsite, as well as
8 operational lighting. And it is all generally
9 directed in nonglare; and also operational noise.
10 So, all right, do you have anything
11 more, Mr. McKinsey, on your list of -- we got down
12 to visual.
13 MR. MCKINSEY: I wanted to --
14 MS. JESTER: Excuse me.
15 HEARING OFFICER SHEAN: Yes.
16 MS. JESTER: This is Laure Jester from
17 the City of Manhattan Beach. Could I just add a
18 couple comments on visual?
19 HEARING OFFICER SHEAN: You bet.
20 MS. JESTER: I just wanted to reiterate
21 what we indicated in our letter that we sent
22 yesterday, that we do agree with the Coastal
23 Commission assessment that the area is visually
24 degraded and does need treatment.
25 When you look at the area you see

1 enhancements that have been provided at the
2 Chevron Refinery with landscaping, at the Hiparian
3 Treatment Plant with landscaping and architectural
4 treatment.

5 And the area is used by millions of
6 people that use the beach every year, and tens of
7 thousands of people that drive on Vista del Mar
8 every day, and thousands of people that live in
9 the El Portal area.

10 And we agree that there does need some
11 visual enhancement in that area.

12 That's it.

13 HEARING OFFICER SHEAN: Okay, thank you.
14 All right, your --

15 MR. McKINSEY: I wanted to stay on
16 visual for just a second because I heard something
17 in the last -- in this dialogue that is insightful
18 as to part of why we haven't simply said great,
19 let's put architectural treatment all over this
20 building, all over these structures.

21 One of our concerns has been that
22 whatever is done here has to be something that in
23 particular we, the plant and the people that work
24 there and the managers have to deal with the
25 community forever. And as does the compliance

1 unit of the Energy Commission, and the compliance
2 manager.

3 And that the kind of solutions that are
4 talked about as to what is an enhancement and what
5 isn't an enhancement should reflect community
6 values and community input.

7 And the simple idea that because
8 something is or is not feasible is enough, and
9 because there is an assertion without any visual
10 experts explaining the science behind why they
11 feel something is an enhancement or not, makes it
12 a, quote, feasible enhancement, to me isn't a good
13 answer.

14 To me, a good answer is that the Energy
15 Commission consider the Coastal Commission's
16 input, but that they're still the deciders of
17 applicable LORS in this situation. That the
18 Coastal Commission is not an agency that is making
19 decisions that the Energy Commission has to take.
20 That the decision is being made by the Committee
21 and the Commission, as to what is LORS compliance
22 in this particular LORS.

23 And that they should consider the input
24 that you're hearing from the community regarding
25 what would be a visual enhancement and what

1 wouldn't be a visual enhancement, and things that
2 they would like to see be part of that
3 feasibility.

4 The problem I have with having us be the
5 broker of that is if we disagree with this
6 application of this provision, then we're not able
7 to be the ones that go out and arrange and broker
8 an agreement among everybody about how it's
9 resolved.

10 We remain committed to trying to do
11 everything we can to landscape and especially --
12 and, in fact, our primary focus is not on the
13 north end of the project, where we don't think
14 there are a lot of users that are going to see any
15 differences. And, in fact, may even, we think,
16 see enhancements by the new structures.

17 But we really think the focus should be
18 on the southern end when we talk about visual
19 imaging. And that's why we spent, and we continue
20 to listen, and we're not done listening as to how
21 to make the landscaping conditions of
22 certification in the visual area congruent with a
23 lot of these other concerns.

24 And maybe they have to be the ones that
25 have to fit with this Coastal Act provision. But

1 I think what I'm hearing here is something that
2 I've been saying all along, which is one thing for
3 an agency to make a decision on its own of what
4 they think is or is not an enhancement.

5 But one of the reasons why we think that
6 by requiring us to go through the evidentiary
7 process you get a better quality input is instead
8 of an assertion that this is an enhancement, a
9 visual expert has to defend that decision, that
10 this is degraded and that this is an enhancement
11 to that degradation.

12 And other parties such as the local
13 residents have the ability to say, wait, we think
14 this is what is an enhancement, and this is what
15 we want to see. And the Energy Commission will
16 have the ability to reach a decision as to what
17 they want to impose upon an applicant when they're
18 considering the application of the statute.

19 MR. ABELSON: My only point, Mr. Shean,
20 earlier on the process --

21 HEARING OFFICER SHEAN: I think we've --

22 MR. ABELSON: -- is -- well, --

23 HEARING OFFICER SHEAN: -- worked this
24 thing to death. Can we just give him the time
25 here. Let's just go on. I mean, I know --

1 MR. McKINSEY: I'm not disagreeing, but
2 I just wanted to indicate there was something
3 insightful going on in here that's useful to
4 incorporate.

5 HEARING OFFICER SHEAN: Well, okay, and
6 I -- the Committee's view on this visual stuff is
7 the guy who loves trees wants to have trees up;
8 the guy who likes the view doesn't want trees.
9 And that's the situation you can kind of get in,
10 somebody likes one color, somebody likes another,
11 and somebody wants the building skinned, somebody
12 thinks you should be able to see through it.

13 And it's a difficult thing, and
14 unfortunately I'm not sure that litigating is the
15 way to get through it. If there's something that
16 we can do at a Committee level that won't require
17 that, I think we're going to try that first.

18 So, whether it's to attempt to satisfy
19 the Coastal Commission, the staff, the local
20 residents, or whoever it is, we'll probably try
21 that first.

22 Okay. Now, if you have another item
23 let's go so we can --

24 MR. McKINSEY: The soil and water data
25 responses that we filed on November 5th, as I

1 understand, we're going to receive comments
2 tomorrow. I've got an understanding of what some
3 of them are, but regarding their adequacy. I
4 don't think that today would be the time, I don't
5 have the people in place to evaluate whether we'd
6 agree to them or not, but as to scheduling issues
7 related to the soil and water information,
8 clearly, as with any, even though the discovery
9 period was closed, and this would also reflect Mr.
10 Perkins, to the extent we're not able to reach an
11 agreement with him in providing information he
12 requires, parties have the ability to assert we're
13 not satisfied with the responses. And this is
14 what we require in order to be satisfied.

15 And we would have to either decide we're
16 going to go along with that, or we would have to
17 oppose it, thus pushing that issue to the
18 Committee to make a decision as to whether or not
19 that issue is ready to move forward.

20 Often those are the things that do get
21 finally resolved at a prehearing conference.
22 That's what I'm getting is, is until we see what
23 the comments are, I'm not going to prejudge them
24 either way.

25 There may be some very substantive

1 comments regarding the adequacy of our soil and
2 water responses. And when my team looks at them
3 and evaluates them, I will have a better ability
4 to say this is something we do need to get in, and
5 how long it'll take. Or we disagree that that's
6 necessary for LORS or under the Warren Alquist
7 Act.

8 So we haven't prejudged them either way.
9 But in terms of needing to reopen discovery or
10 needing to mandate a particular path, I mean
11 that's set up already. The parties disagree with
12 the adequacy of a resolution of a discovery issue
13 they're able to take that to the Committee to ask
14 for particular action.

15 But we're not going to be uncooperative,
16 we're going to be communicative and completely
17 cooperative in trying to resolve any outstanding
18 discovery issues.

19 MR. REEDE: And they will get that this
20 afternoon.

21 MR. PERKINS: In the area of being
22 completely cooperative, what is your understanding
23 of the timetable of when we should do what in
24 order to get -- in order to properly bring issues
25 of improper responses to discovery to the

1 Committee's attention? Or to get them fixed by
2 you?

3 MR. MCKINSEY: Well, Mr. Perkins, I
4 thank you for asking that, because I've made an
5 action item on my to-do list already that is to
6 call you. In fact, better yet, sit down with you
7 and look at the landscaping plan and the other
8 information and talk with you about the
9 information you're looking to get, and other
10 things.

11 But at a minimum I think, and this is an
12 area where you get into the procedural side of it,
13 and I know you're an attorney and you can follow
14 this part, but you have to file a petition to the
15 Hearing Officer, to the Committee if you're
16 unsatisfied with the resolution that we've
17 reached.

18 And I agree with your assessment that we
19 had made an agreement that when we provided this
20 data that you would have an opportunity to say
21 whether or not you thought the responses were
22 adequate. And I stand by that. And so that's why
23 I want to talk with you and see what information
24 you want, and what we can do.

25 MR. PERKINS: You will call me and

1 discuss scheduling after we're done here?

2 MR. MCKINSEY: Yes.

3 MR. PERKINS: Thank you.

4 HEARING OFFICER SHEAN: Okay. Anything
5 more from you?

6 MR. MCKINSEY: One other thing I wanted
7 to come back to that I didn't mention, and Ms.
8 Murphy raised it, was when I was talking about
9 noise I didn't emphasize, we have a condition on
10 the table as an offer regarding a noise
11 enhancement for unit four.

12 In other words when I was speaking about
13 enhancements I was speaking specifically under the
14 context of visual, and she reminded me, we have
15 said that we believe, and will continue, and our
16 noise sup testimony is going to -- our new noise
17 information, that we are not going to have any
18 noise impact under the California Environmental
19 Quality Act, the Warren Alquist Act, as
20 interpreting Manhattan Beach LORS regarding the
21 operational changes.

22 However, in an interest of trying to
23 reach agreement we're willing to offer an
24 enhancement to unit four, where we would take on a
25 condition that would mandate a reduction of a

1 specific decibel level of noise from unit four by
2 installation of shielding.

3 We're making that offer, and it's still
4 on the table in the efforts that especially after
5 they see this much more refined and complete
6 information that they may finally get comfortable
7 with the idea that, indeed, that is a preferable
8 alternative to accept that condition.

9 If we're not able to reach agreement on
10 that condition and we're particularly interested
11 in the local El Portal community intervenors and
12 the City of Manhattan Beach's position regarding
13 our new noise information in this proposal, if we
14 can't reach agreement that they would like to have
15 this condition, in addition to particular noise
16 conditions that we're all happy with, then we
17 would withdraw that offer for an enhancement and
18 we would instead expectively be spending the money
19 trying to defend the idea that we don't have
20 significant impacts.

21 But I would much prefer, by making this
22 offer, we're guaranteeing them not only that we
23 don't have significant impacts, but an enhancement
24 that's cost effective from our perspective, and I
25 think is beneficial from their perspective. And

1 that, I wanted to reiterate, that offer is on the
2 table. And ultimately I think we would probably
3 have to at the prehearing conference say, well,
4 we've got to gear up to fully litigate noise, so
5 we can't continue to say we'll go ahead and
6 guarantee a -- we'll install shielding on unit
7 four and reduce it.

8 Because I don't think -- I think we can
9 show it won't be required under the law. And I am
10 interested in reiterating that. That offer's
11 still there. I don't think right now would be the
12 time to ask anybody to judge it. I think after we
13 provide this noise testimony would be a better
14 chance to really look at the big picture of it.

15 MR. REEDE: Excuse me, Mr. Shean. My
16 memory serves me a little bit differently than Mr.
17 McKinsey's, in that when we asked for renderings
18 or drawings that showed this, it was no longer on
19 the table. So, --

20 HEARING OFFICER SHEAN: Okay, I don't
21 want to get into this.

22 MR. MCKINSEY: That's a --

23 HEARING OFFICER SHEAN: Okay, stop.

24 MR. REEDE: So we need -- we needed
25 to --

1 HEARING OFFICER SHEAN: All right., --
2 MR. REEDE: -- address that outside of
3 here.

4 HEARING OFFICER SHEAN: No, no --

5 MR. McKINSEY: I'm speaking of --

6 HEARING OFFICER SHEAN: -- actually,
7 because I'm disregarding what Mr. Reede had to
8 say, so we don't need to take this subject
9 further.

10 You know, whether or not it is on or off
11 the table, whether or not somebody's being told it
12 could come off, I don't care. Okay. We've done
13 enough with this.

14 Now, is there any other party -- I'm
15 basically looking to CURE now, is there anything
16 you'd like to weigh in on?

17 MR. FARROW: Well, having missed my
18 opportunity to speak timely on all this stuff, I
19 don't want to burden the record with a lot of
20 comments. I just want to just summarize our
21 submission.

22 We think that with regard to the air you
23 need to get a determination of compliance, and so
24 we would recommend that you wait for that.

25 HEARING OFFICER SHEAN: The final is

1 what you're referring to?

2 MR. FARROW: Yes. Certainly wait for
3 that before scheduling your evidentiary hearings.

4 With regard to biological impacts, it
5 seems clear that staff, at least, has concluded
6 that there isn't an adequate analysis now, and I
7 think that leaves the applicant with this choice:
8 Either go on the record or produce a study and let
9 people have an adequate amount of time to review
10 it.

11 And it appears that they intend to
12 produce a study. We had been led to understand
13 that there would be a cooperative process whereby
14 we could evaluate the protocol that had been
15 submitted, comment on it. It appears that that
16 won't happen.

17 At this point we will, you know, comment
18 on the study, itself, but there clearly has to be
19 time. It would be unfair for the applicant, as it
20 suggested in its recent letter, to make its case
21 for what appears to be the first time in the
22 evidentiary hearing. So we would strongly support
23 the notion that there be an adequate amount of
24 time between the production of any results and the
25 actual holding of evidentiary hearings.

1 There have been past offers to produce
2 underlying data in connection with that validation
3 study, which have not yet been forthcoming. In
4 particular, there's a January 2001 study that
5 purports to show why it's reasonable to compare
6 King Harbor data and data at the El Segundo site.

7 Despite a data response in which it was
8 promised to produce that, that study hasn't been
9 produced. I would assume that that will be part
10 of the submission, if there is going to be one, on
11 December 5th. But if it isn't, that's, I guess,
12 an example of the kind of things that we would
13 want to be able to bring up as an inadequate data
14 response.

15 Finally, with regard to hazardous
16 wastes, we'll wait and see what the staff's
17 comments are on the submissions, but it appears to
18 us that the applicant has yet to provide responses
19 to requests made, in particular by the Coastal
20 Commission, in this area. They asked for the
21 remedial investigation workplan, a workplan that
22 would involve setting forth sampling criteria,
23 protocols and soil removal methodologies for
24 hidden contaminants under the structures, under
25 the tanks and under a couple of the buildings.

1 Without having this workplan set forth
2 as part of the record, I think you have a classic
3 deferral of mitigation. You don't have any sense
4 of whether there's contaminants there; that
5 there's even a protocol for figuring out what kind
6 of contaminants are there. And clearly they
7 haven't set forth methodologies for addressing
8 contaminants that will be under those structures.

9 Finally, with regard to groundwater, the
10 Coastal Commission asked for information regarding
11 the feasibility of their proposal to dewater
12 millions of gallons of water underneath the site.
13 There hasn't been a response to that request for
14 the adequacy of the charcoal method of removal of
15 these contaminants.

16 And I think the applicant has admitted
17 that it hasn't done its homework here. In its
18 most recent responses to data requests it's
19 acknowledged that it hasn't yet conferred with
20 Chevron, with the Regional Water Quality Control
21 Board regarding its plan to pump someplace between
22 13- to 65-million gallons of contaminated water
23 out from underneath the site.

24 It acknowledges that that is nothing
25 more than a preliminary estimate, and it cannot

1 firm that estimate up and determine the masses and
2 concentrations of pollutants in that until it does
3 some sort of pump testing and confirms with these
4 folks.

5 So I think that there's work to be done
6 yet in this area. And if discovery is not open,
7 then that leaves us with the vehicle of simply
8 asserting that the previous responses in these
9 areas have been inadequate, and asking for
10 clarification and further information.

11 That sounds to me functionally
12 equivalent to discovery, but we'll go that route
13 if we need to.

14 HEARING OFFICER SHEAN: Okay.

15 MR. RIZK: Forgive me, this is Tony Rizk
16 from the Regional Water Quality Control Board.
17 Forgive me, I had to leave again and just got back
18 a minute ago.

19 The Regional Board is still awaiting for
20 information from the applicant concerning the
21 groundwater contamination under the tanks. And at
22 this time the Regional Board is contemplating not
23 waiting anymore, and issuing a cleanup and
24 abatement order to El Segundo.

25 We have been holding back on that,

1 awaiting a resolution through this process.
2 However, if there's no timely resolution our
3 intent is to issue a cleanup and abatement order
4 to El Segundo of that.

5 I hope everybody could hear me okay.

6 HEARING OFFICER SHEAN: We can.

7 MR. RIZK: Thank you.

8 HEARING OFFICER SHEAN: Thank you.

9 Okay, just to move this on a little bit. I guess
10 I want to ask about what Coastal Commission action
11 we feel is necessary, and I guess by that I mean
12 not staff letters and recommendations, but the
13 Coastal Commission --

14 MR. REEDE: We need the Coastal
15 Commission consistency report.

16 HEARING OFFICER SHEAN: And you're
17 talking about a Commission-adopted report?

18 MR. REEDE: A Commission-adopted report.
19 Originally Mr. Luster had offered to bifurcate the
20 findings because we knew biology was going to be
21 coming -- marine biology was going to be coming in
22 late. And that's why had originally scheduled
23 half of the information to be done in November and
24 the other half to be done in December.

25 The lack of information moved that out.

1 Whether Mr. Luster is still concerned, or still
2 has his offer on the table bifurcating the report
3 I don't know, and he can answer that.

4 However, it would be to our advantage to
5 have one consistency -- well, a full report come
6 out of the Coastal Commission so that issue is
7 done forevermore.

8 HEARING OFFICER SHEAN: Mr. Luster, do
9 you have --

10 MR. LUSTER: Sure. This is Tom Luster.
11 I'd be happy to prepare the report and get it in
12 front of the Commission. You know, I need some
13 lead time to do that, but I suppose once the
14 Committee determines when the record is closed,
15 either entirely or for particular aspects of the
16 proposed project, we could move forward from
17 there.

18 So once I have a firm sense of this is
19 the full set of information that we'll be making
20 our determination on, once I have that I'll be
21 able to put together my report.

22 And if the scheduling decision is to
23 essentially close the record on the visual or
24 noise or something like that in the next few weeks
25 and continue biology, then, yes, a bifurcated

1 report is feasible on my end.

2 So I guess bottomline, as soon as I know
3 when the record is closed for all or part of the
4 project, I'll respond to that and present the
5 report to the Coastal Commission based on those
6 dates.

7 MR. REEDE: I think we have a problem
8 with terminology --

9 HEARING OFFICER SHEAN: It's just a
10 semantic difference, I think.

11 MR. REEDE: Yes, a semantic difference.

12 HEARING OFFICER SHEAN: I'm taking when
13 he says record closed to mean the final data --

14 MR. REEDE: The final supplement is
15 issued. Or prior to the final supplement being
16 issued, that the applicant has provided us
17 everything they're going to provide us, and we're
18 able to begin moving in that process.

19 HEARING OFFICER SHEAN: Right.

20 MR. LUSTER: Yes, the semantics. Once I
21 have the information, once I hear from either the
22 applicant or the Energy Commission Staff, that it
23 appears all the information you're going to have
24 on this aspect of the project, I'll write up my
25 report and get it in front of our Commission.

1 And we can do that looking at the
2 proposed project in its entirety or particular
3 aspects of it, whatever the Committee decides.

4 HEARING OFFICER SHEAN: Okay.

5 MR. McKINSEY: I want to make sure we're
6 being consistent with the Warren Alquist Act and
7 the California Coastal Act.

8 I believe that the Commission, i.e. the
9 Committee and the full Commission, needs to
10 receive that information. I don't believe that
11 the staff has to have a consistency report prior
12 to producing the final staff assessment.

13 HEARING OFFICER SHEAN: Okay, no, I mean
14 we can all read the language in the Act and we'll
15 try to figure this out.

16 MR. ABELSON: Mr. Shean, the only other
17 thing I would add is to ask Mr. Luster to remind
18 you and all of us of the tentative dates that his
19 Commission meets. I think it's once a month, and
20 it might be helpful to you and to others to sort
21 of have a sense of when those dates are for the
22 next few months, if you know them, Mr. Luster?

23 MR. LUSTER: Sure. Generally the
24 Coastal Commission meets the second week of each
25 month. For instance the December meeting runs

1 from the week of December 11th. January meeting
2 is, I believe, a little sooner in the month. Just
3 a moment. I'll look that up right now.

4 Actually 8th through 11th in January.
5 In general, my requirement is anything on the
6 agenda I need to get to the Commissioners about
7 three weeks in advance is our mail-out date.

8 And then I would need, you know,
9 realistically a week or two before that to have
10 information to base my staff report on.

11 So if I had something -- whatever I had
12 four or five weeks later could show up in front of
13 our Commission.

14 HEARING OFFICER SHEAN: Okay, that's
15 very helpful.

16 MR. LUSTER: Just to give you a sense of
17 our scheduling constraints.

18 HEARING OFFICER SHEAN: Um-hum.

19 MR. REEDE: So, we would, Mr. Shean, be
20 talking about a February meeting based upon
21 everything coming in December the 5th.

22 HEARING OFFICER SHEAN: Okay, let me
23 just -- I have a couple other questions.

24 I mean, first of all, it's obvious that
25 with your having been accepted as data adequate in

1 February of 2001, we're not going to make that
2 date as a 12-month decision unless you consent to
3 extend the schedule.

4 MR. McKINSEY: We do so consent.

5 HEARING OFFICER SHEAN: Okay. The next
6 thing I had in mind is -- I guess I'm informed,
7 and I wonder whether that impacts -- I'm informed
8 that units one and two may be operational during
9 the summer of 2002, is that correct?

10 MR. McKINSEY: Certainly they may.
11 Obviously the change in the schedule has forced us
12 to, and there is no answer yet on whether we will
13 want to run units one and two during the summer of
14 2002 or not, and I don't know when we'll reach
15 that decision. But at this point it's become
16 aware that certainly we can run them in the summer
17 of 2002, just based on the schedule we're on, and
18 the timing that that might be appropriate to
19 utilize them during the next summer.

20 Originally the project was based on a
21 schedule where we would be shutting down the units
22 at the end of this summer that just ended, and
23 then commencing the project. And clearly, that's
24 gone. The summer is the critical timeframe, both
25 for the value of units one and two, and their

1 megawatts that they generate, in addition to their
2 value, I guess their value to both El Segundo, as
3 well as their value to the state as a resource.

4 HEARING OFFICER SHEAN: Okay, let me
5 ask, I'm just going to go around the room to do
6 this, so we can sort of fill in some of these
7 things.

8 In your mind what are the initial
9 critical path items which, without the staff
10 having them, they cannot proceed to prepare their
11 final staff assessment?

12 MR. MCKINSEY: In our mind it is the --
13 it's more what we would desire them to have, and
14 that is the biology --

15 HEARING OFFICER SHEAN: Well, let me put
16 it this way then. What are you prepared to
17 present to them so that they can do that? And, in
18 that sense, you would also be picking the N-date,
19 which we're using an N-plus numbering system here,
20 so that it sort of begins the new schedule, if you
21 will.

22 MR. PERKINS: Excuse me, Mr. Shean, for
23 those of us who don't have that schedule, is N-
24 plus zero today?

25 HEARING OFFICER SHEAN: No, N-plus --

1 well, first of all, N has not been figured out,
2 and I think that's probably part of the question
3 that I just asked Mr. McKinsey is first of all,
4 enumerate those items that you are going to
5 provide. And then give us the N-date, which will
6 be the date upon which you would anticipate that
7 staff will have all of that.

8 So, I think that's how we're going to --

9 MR. PERKINS: I understand that, but
10 when somebody says N-plus 60, what date are they
11 talking about?

12 HEARING OFFICER SHEAN: Well, we won't
13 know till we know what N is.

14 MR. PERKINS: Oh, I apologize. Okay.

15 MR. MCKINSEY: I think the concept, as
16 I'm looking at this draft, is to say that N is the
17 point where the necessary information has been
18 provided by the applicant. That date.

19 HEARING OFFICER SHEAN: Okay, --

20 MR. MCKINSEY: And our envision of that
21 is the biology information, the noise information,
22 because we want that as part of the record. I
23 think it will better give all parties the
24 opportunity to understand the project in those two
25 areas.

1 I'm looking at the list of documents,
2 and there was one on here that I didn't come
3 prepared to know the answers on. You listed a
4 will-serve letter for water suppliers. I believe
5 we have completed that.

6 And you also listed the Cal-ISO
7 transmission interconnection review and approval.
8 And I believe those are done. But I didn't come,
9 and I'm hearing from Mr. Reede that they are --

10 MR. REEDE: Those are both non issues,
11 okay. Those were resolved back in, I believe,
12 May.

13 HEARING OFFICER SHEAN: Yeah, and I'm
14 going to have to tell you, this sort of came off a
15 generic list, and --

16 MR. MCKINSEY: And then in addition, it
17 is possible, and like I said, I'm not prejudging
18 anybody's objections to the adequacy of our
19 responses, that given the comments we receive on
20 our responses to Mr. Perkins and Ms. Murphy's data
21 requests, and to the soil and water data requests,
22 that we may agree that there's something in there
23 that is necessary.

24 Otherwise, that may be an issue of
25 contention that would have to get resolved. But

1 at this point I couldn't say that I see anything
2 in there that is a necessary --

3 HEARING OFFICER SHEAN: And so, right
4 now on your list is bio and noise? Right?

5 MR. MCKINSEY: Correct.

6 HEARING OFFICER SHEAN: And is December
7 5th your submission date?

8 MR. MCKINSEY: Yes.

9 HEARING OFFICER SHEAN: Okay, let's go
10 to the staff and one of you go through the same
11 exercise in terms of what you think are critical
12 path items that you require to begin the
13 formulation of your final staff assessment.

14 MR. REEDE: The first would be the
15 preliminary determination of compliance published
16 and delivered to the EPA.

17 I agree with Mr. McKinsey on the
18 impingement and entrainment study results, and the
19 noise issue.

20 The soil and groundwater contamination
21 remediation plans. The -- clarifications which I
22 will be giving to Mr. McKinsey, or I will be
23 docketing this afternoon. And those relate to the
24 November 5th data responses.

25 Because Mr. McKinsey has already stated

1 that the architectural treatment of the facility
2 will be going to litigation, I'm not going to beat
3 that issue anymore. It's open for additional
4 discussion.

5 The Coastal Commission, I would not put
6 in the critical path -- I would put the Coastal
7 Commission at approximately N plus 60, as with the
8 PDOC -- I mean the FDOC on N plus 60.

9 There are some issues related to the
10 NPDES, specifically the construction permit that
11 need to be resolved that we found in the November
12 5th data responses as not being up to standard,
13 and needing supplemental information.

14 Would you hold on one second, please.

15 (Pause.)

16 MR. REEDE: I was asked by counsel to
17 clarify that once we get the consistency report
18 from the Coastal Commission, we will then issue
19 the final staff assessment. And typically that's
20 approximately two weeks after the Coastal
21 Commission consistency report, because we've
22 gotten all the information, we've been able to
23 analyze the data, and down the line.

24 HEARING OFFICER SHEAN: Okay, I'm sorry,
25 to me that introduces an inconsistency with my

1 notes here. Because I had Coastal Commission
2 information not critical, N plus 60. Is that
3 different from what you're telling me now?

4 MR. REEDE: Well, that's correct. We
5 had stated that once the biological report comes
6 out we're going to need about 60 days before we
7 issue the final staff assessment related to
8 biology. And because of the FDOC not coming out
9 till 45 to 50 days, well, it won't come out until
10 50 to 55 days after it's been originally
11 published.

12 So we're actually talking about the
13 final supplement coming out 60 days from N. N
14 plus 60 would be the staff assessment final
15 supplement.

16 So that's where the confusion comes up,
17 because additionally on those remediation plans,
18 my staff inform me those typically take six
19 months. I'm going to have to ask them to do that
20 within 60 days.

21 So, the supplement coming out after all
22 the critical path issues have been done, right now
23 we're still focusing on approximately 60 days.
24 Based upon the information received, 30 days isn't
25 going to -- while I may have portions of it,

1 issuing a final supplement does not need to be a
2 bifurcated document.

3 HEARING OFFICER SHEAN: Okay. Any more?

4 MR. REEDE: Oh, I'm sorry, the street
5 sweeping proposal, or the enhanced street sweeping
6 proposal as part of the air quality supplement,
7 needs to be at N as a critical path issue. Once
8 we've understood what they're doing, then we can
9 begin redoing our supplement.

10 HEARING OFFICER SHEAN: No, is this
11 information you currently do not have?

12 MR. REEDE: This is information we
13 currently do not have, and as stated in my
14 comments, we've asked for it three times over the
15 past month.

16 HEARING OFFICER SHEAN: So, are you
17 asking for material that has already been
18 submitted by the applicant to the Air District?

19 MR. REEDE: It's been submitted to the
20 Air District, but it was never submitted to us.

21 MR. MCKINSEY: As I understand it, I
22 think what they don't understand is there is more
23 information the Air District said they want, but
24 we don't -- they haven't told us what it is, and
25 they don't know when they're going to get around

1 to telling us what it is.

2 And that once we get that information
3 that's what the staff is saying they require.

4 HEARING OFFICER SHEAN: Okay. Other
5 than that information you provided duplicates --

6 MR. McKINSEY: Yeah.

7 HEARING OFFICER SHEAN: -- of everything
8 you've given the Air District to the staff?

9 MR. McKINSEY: That's my understanding.

10 MR. REEDE: Except for this enhanced
11 street sweeping protocol proposal. We've never
12 seen that information.

13 MR. McKINSEY: We can't make it until --
14 that's the thing we can't do until the staff tells
15 us what else they want to see.

16 HEARING OFFICER SHEAN: The staff of the
17 District?

18 MR. McKINSEY: The Air District, yeah,
19 excuse me, the Air District Staff.

20 HEARING OFFICER SHEAN: All right.

21 MR. McKINSEY: Which they haven't even
22 looked at it, as I said.

23 HEARING OFFICER SHEAN: All right. And
24 you don't know when that will occur?

25 MR. McKINSEY: Correct.

1 MR. REEDE: Which is one of the reasons
2 that I put the requirement for the FDOC in as part
3 of us issuing the final air quality supplement,
4 because that would allow the proposal to be
5 delivered. It will allow ARB comments. And it
6 will allow the EPA comments.

7 So we have a good feel for what they're
8 saying they're permitting. And then we can
9 evaluate what the actual impacts of what they're
10 saying they're going to permit under CEQA.

11 HEARING OFFICER SHEAN: Okay. Now,
12 would it be appropriate to think that the Air
13 District will have posed those questions to you
14 and gotten your answers before they notice the
15 PDOC?

16 MR. McKINSEY: Yeah, their stated plan
17 is they're going to wait until they tell us what
18 they want, and then we give it to them. And then
19 they are going to maybe perhaps revise the PDOC,
20 or maybe not, but then they'll definitely say,
21 okay, now we can notice, take final comments, and
22 issue an FDOC.

23 But they do not want to notice until
24 they tell us what they want regarding street
25 sweeping protocols, and we give it to them.

1 HEARING OFFICER SHEAN: Okay. And, --

2 MR. REEDE: And so that's really the N.

3 HEARING OFFICER SHEAN: All right, well,
4 we're going to play with this a little bit. Okay,
5 that's it from you, Mr. Reede?

6 MR. REEDE: Let me just check with staff
7 so they don't throw things at the back of my head.

8 (Laughter.)

9 HEARING OFFICER SHEAN: They were going
10 to do that anyway.

11 MR. REEDE: Oh, the additional
12 information that we required from the data request
13 relating to the quantities of waste going into
14 which outfalls -- oh, the waste stream chemistry
15 was not provided, and that was one of the data
16 requests that we had made to them.

17 That's all going to be in the report
18 that I docket. And there were additional
19 questions relating to the storm water pollution
20 prevention plan that they're going to need to
21 respond to.

22 MR. MCKINSEY: Primarily erosion control
23 drawings of the tank farm area.

24 MR. REEDE: And erosion control drawings
25 of the tank farm area were found not to be

1 provided.

2 HEARING OFFICER SHEAN: Okay. How about
3 CURE, do you want to weigh in on this?

4 MR. FARROW: I think we generally
5 support what staff is requesting with -- I need to
6 see what they're asking for for clarification on
7 soil and water, but we're particularly concerned
8 that we get some kind of a response to the
9 outstanding data requests in that area that I
10 mentioned of the effectiveness of the treatment
11 plan for groundwater pumping and remedial
12 investigation workplan for the hidden contaminant
13 areas.

14 MR. REEDE: One thing that concerns me,
15 Mr. Shean, based on Dr. Rizk's comments that
16 they're getting ready to issue a notice of
17 violation, abatement order, --

18 MR. RIZK: Yes, cleanup and abatement.

19 MR. REEDE: A cleanup and abatement
20 order, in the past that has precluded the
21 Commission from licensing a plant. I believe it
22 was Sunrise that we were not allowed to issue a
23 permit because there was an outstanding notice of
24 violation, in this case from the Air District.

25 I think that needs to be addressed and

1 taken into consideration with any schedule that we
2 put together.

3 If they are under a cleanup and
4 abatement order, until that order is discharged or
5 fully complied with, are we going to be able to
6 permit the plant? And I think that's a question
7 for you.

8 HEARING OFFICER SHEAN: All right.
9 Anything from folks on the phone?

10 MR. RIZK: This is Tony Rizk from the
11 Regional Board. I'd like to provide a bit of
12 clarification, if you permit me, Mr. Chairman.

13 What we are doing right now, we have not
14 yet issued the cleanup and abatement order to El
15 Segundo. We had internally made a decision to
16 wait and work with the California Energy
17 Commission to insure that if the California Energy
18 Commission is satisfied with the cleanup plan as
19 part of the removal of the tank farm, then the
20 Regional Board would not issue a cleanup and
21 abatement order, and would simply be supporting
22 the California Energy Commission's position.

23 If, on the other hand, this does drag
24 on, or if the applicant decides not to remove the
25 tank farm and clean up, or if the applicant

1 decides not to go through with this project. Or
2 even if they do are looking into it, but takes a
3 lot longer, months. You know, the end question
4 that had been brought up earlier, then at that
5 point the Regional Board intends to proceed with
6 the cleanup and abatement order. And that would
7 create the situation that Mr. Reede has brought
8 up.

9 On another issue while I have the floor,
10 there was a question about the quality of the
11 wastewater produced at the facility. I believe
12 that the concern is the quality of the wastewater
13 that is produced from the in-plant waste stream,
14 what they call the low volume waste, prior to
15 mixing with the cooling water.

16 Thank you, Mr. Chairman.

17 HEARING OFFICER SHEAN: Thank you.

18 Okay, anybody on the phone, the other intervening
19 parties, want to weigh in on any scheduling, or
20 I'm sorry, critical path issues, the critical path
21 information matters?

22 MR. PERKINS: Yes, please. This is Bob
23 Perkins.

24 HEARING OFFICER SHEAN: Go ahead.

25 MR. PERKINS: We do need to work out

1 completion of responses to our data requests.
2 Once those are resolved, either because we get
3 more information or we take it to the Committee or
4 whatever, that will be out of the way.

5 And I heard Mr. McKinsey remove one of
6 the items that I had on my critical list just a
7 few minutes ago, but I'll bring it to the
8 Commission's attention to make sure that you
9 understand it the same way.

10 The applicant deliberately chose not to
11 measure ambient noise levels last summer, and I
12 have been concerned that since you can't measure
13 them in the winter, that's not a representative
14 time to do it, that they would never be able to do
15 that, and it could become a problem. Although
16 theoretically it's not a problem, I don't think,
17 anyway, for licensing. You just can't start
18 construction until you take the measurements
19 because you're going to change the ambient when
20 you start construction.

21 However, if Mr. McKinsey is correct that
22 they will still be operating these plants,
23 therefore not destroying anything, not changing
24 the environment next summer, then they can comply
25 with the staff's request first made last spring,

1 that they take a 30-day measurement during the
2 months of I think it was June, July or August.

3 And that, it seems to me, the
4 requirement needs to be in place, but the
5 measurements don't need to be in place for them to
6 get licensed, for them to get approval.

7 So I think that is not a critical path
8 item for this process, although it would be for
9 construction.

10 HEARING OFFICER SHEAN: Okay,
11 understood.

12 MR. PERKINS: That's about all I have.

13 HEARING OFFICER SHEAN: I understand.
14 Okay, anything from anyone else in our audience?

15 MR. GARRY: This is Paul Garry in El
16 Segundo. I have a couple things.

17 This El Segundo is in the path, and we
18 continue to believe that both the slope stability
19 analysis and the liquefaction analysis need to be
20 completed prior to certification. And that's an
21 item that's not been supplied yet by the
22 applicant. We think those are required for CEQA
23 compliance.

24 Additionally I wanted to ask a question
25 about the issue was brought up about opening up

1 discovery for a 30-day period to complete
2 analysis. And I wanted to find out if that would
3 mean that new data requests could be submitted by
4 other parties, or would it just be opening it up
5 for the Commission Staff?

6 HEARING OFFICER SHEAN: I think normally
7 the observance of the due process concept, it's
8 open for one, it's open for all.

9 MR. GARRY: And I don't know what kind
10 of -- what kind of forum would that -- or how does
11 that decision get made, or who makes that decision
12 whether discovery is reopened?

13 HEARING OFFICER SHEAN: It would be the
14 Committee's decision and it would be reflected in
15 the order.

16 MR. GARRY: As a result of --

17 HEARING OFFICER SHEAN: Of what we're
18 doing today.

19 MR. GARRY: -- today? Okay.
20 Additionally, in the City of El Segundo we're
21 interested in finding out what the actual street
22 sweep thing proposal would be, because we
23 obviously would be one of the cities that they
24 would be looking for to implement such a program.

25 And without knowing what it is in any

1 detail it would be difficult to make a finding
2 that it's, you know, approvable.

3 We also, I think the visual enhancement
4 issue, we believe we concur with the Coastal
5 Commission that there is a degraded environment,
6 and that not enough information has been provided
7 by the applicant to support a finding otherwise.

8 We have concerns about the tank farm
9 responses that have been submitted and that they
10 don't address the staging area uses that are being
11 proposed by the applicant. It only discusses the
12 parking needs on the tank farm area, and we
13 believe that there's additional information that
14 needs to be submitted by the applicant that I
15 believe was requested previously by various
16 parties.

17 And additionally, I believe the
18 response, I don't believe, has ever been provided
19 to the City of Manhattan Beach's traffic data
20 request from a number of months ago. But
21 Manhattan Beach can maybe better address that.

22 And those are the additional items that
23 I think need to be resolved or submitted by the
24 applicant.

25 That's all I have.

1 HEARING OFFICER SHEAN: All right,
2 thanks.

3 MS. JESTER: This is Laure Jester from
4 the City of Manhattan Beach.

5 HEARING OFFICER SHEAN: Um-hum.

6 MS. JESTER: Basically the issues I
7 outlined in my letter sent yesterday, and the ones
8 that I think that are critical that need to be
9 completed before the N date, or whatever you want
10 to call it, is the architectural treatment. But I
11 understand there's disagreement on that.

12 The tank farm, I guess we're calling it
13 development plan. This goes back to a data
14 request from June 22nd, although I think the date
15 is actually wrong on that. I think it should be
16 July 22nd, where we requested specific information
17 on the tank farm area. And some of it was
18 provided, the elevations, but the site plan that
19 shows the actual future development of that was
20 not provided. As well as the landscaping
21 calculations to show compliance with the El
22 Segundo landscaping requirements, the LORS for El
23 Segundo, that was not provided.

24 We had some other specific comments on
25 the landscape plan, itself, the concept plan that

1 was submitted. And it's of such a scale that we
2 can't even read it. So it's difficult to really
3 see if it does address our concerns.

4 The traffic management plan was supposed
5 to be submitted but we didn't receive it; and
6 there were specific comments that we had that we
7 submitted a data request August 2nd. And those
8 have not been addressed.

9 We had a meeting after that August date
10 with the applicant and we discussed providing some
11 sort of a modification to that request, but we
12 haven't received any of that new information.

13 And then the noise projections, actually
14 recording the existing noise levels, as well as
15 the post-construction. I agree with Mr. Perkins
16 on that, that that's something that could take
17 place next summer as long as construction doesn't
18 start. We just want documented actual conditions.

19 HEARING OFFICER SHEAN: Okey doke.

20 MS. JESTER: And the tank farm storage
21 plan that was submitted, that again we made
22 comments. There hasn't been any structural
23 calculations to confirm that that plan will
24 actually work with the compacted soil.

25 The asbestos on the outside; it hasn't

1 been addressed how the crushed concrete stored on
2 the outside of that would impact the asbestos.
3 Would there be any noise and vibration impact from
4 the moving and the dumping of the concrete and the
5 compacting of the dirt in that area.

6 All of those are new issues that have
7 been brought up with the tank farm storage plan
8 that was just submitted.

9 The soil and water request; there was a
10 comment about the south berm could not be expanded
11 because of some pipelines in the area. But it
12 didn't say why those pipelines couldn't be
13 relocated or buried underneath the berm.

14 And that's pretty much it.

15 HEARING OFFICER SHEAN: Thank you.

16 MR. MCKINSEY: I did forget the traffic
17 data responses that we still owe the City of
18 Manhattan Beach that are in their final review.
19 We collected all the traffic data, and we're
20 completing that. And that actually, I think, was
21 in our letter, but somehow it dropped out of my
22 list, I think, because it hadn't been brought up.

23 But we are also planning on providing
24 the City of Manhattan Beach their requested
25 traffic information. And that data response, I

1 think it was 33A, that we had agreed to when we
2 finally got all the data collected we needed at
3 the quality we needed.

4 And then I also wanted --

5 MS. MURPHY: This is intervenor Michelle
6 Murphy. I have one question to ask of the
7 applicant. There's a rumor here among the
8 neighbors that you have actually acquired the land
9 that the tank farm is on as of last week. And if
10 that's true, or even if you're going to acquire it
11 soon, is anything going to be done about the
12 possum and rat nests that are currently on the
13 southern border?

14 MR. MCKINSEY: The rumor is founded in
15 accuracy. We finally reached an agreement with
16 Southern California Edison on Thursday or Friday,
17 I think, and we expressed final agreement on the
18 terms. They have to provide us the final deed
19 that we then accept and ink off, and then we will
20 be the owners of that tank farm area. And that
21 should be shortly.

22 And, indeed, then we would have the
23 ability to address, as owners of that property,
24 the issues that we've heard. And we're eager to
25 do so.

1 MS. MURPHY: Thank you.

2 MR. McKINSEY: The other thing I wanted
3 to raise . We did collect data on ambient
4 conditions as part of this noise information we're
5 providing on the 5th. It's not the 30 days that
6 was suggested by the staff in a condition, and
7 there are a lot of things to go into about the
8 timing and the procedural idea about the staff
9 requiring something before a decision by the
10 Commission.

11 But at a minimum, we collected three
12 different intervals of three days each of noise
13 ambient levels. And what we did was we did an
14 initial three-day, we did another three-day, and
15 then another three-day until we were satisfied we
16 had captured an adequate amount of information
17 with the right ambient environmental conditions to
18 catch the, what we call low-average summer
19 conditions.

20 And we think that that will be
21 addressing all I've been hearing which is, you
22 know, have you really looked at what the ambient
23 condition is at the right time of the year.

24 But it will not be what had been
25 suggested, which was 30 days, but I think it will

1 satisfy everybody's requirements.

2 HEARING OFFICER SHEAN: Okay.

3 MR. REEDE: Mr. Shean.

4 HEARING OFFICER SHEAN: Yes.

5 MR. REEDE: Sir, may I just go over,
6 because I'm starting to get lost in the N numbers.
7 If i could just go over so that I understand
8 clearly what everybody is considering N-zero.

9 The official PDOC is N-zero.

10 Impingement and entrainment study results --

11 HEARING OFFICER SHEAN: Well, that's why
12 I had you and the applicant and the others give me
13 what was on their critical path list. Because I
14 think it's up to the Committee to fill in the
15 blanks and remove some of those that shouldn't be
16 there.

17 MR. REEDE: It was the days after N-zero
18 that I was primarily concerned about.

19 HEARING OFFICER SHEAN: Okay, and I
20 wanted to address this to the applicant here so
21 we're really not -- it's not ready yet. And I
22 guess what occurs to me first is even if we put
23 the staff in the position that they use this PDOC
24 that's out now, there will come a point at which
25 we're going to have to stop awaiting, first of

1 all, their questions to you and your answers, and
2 then their commencement of a notice period for the
3 PDOC.

4 And I guess the other thing that might
5 occur is also something similar to that with the
6 Coastal Commission Staff, where based upon Coastal
7 Commission Staff input our Energy Commission Staff
8 could go so far. But until there is a Coastal
9 Commission-adopted report, the proceeding can go
10 farther.

11 So, first of all, can you react for me
12 to what they think is their need for the time to
13 analyze your new impingement and entrainment
14 validation study?

15 Because let me just say this. I think
16 overall it is a mistake to rush to evidentiary
17 hearings. I think there is value in having you
18 provide the staff as much information as you can
19 and is available. And, of course, that goes out
20 to the public and the other parties.

21 Have them try to gather this into a
22 cohesive document that represents the staff's best
23 opinion, and that that go out publicly. Because
24 then the public can basically see, and by the
25 public I mean the affected agencies. In this case

1 it's the Coastal Commission, the two cities, and
2 then the neighbors, whether or not staff has
3 adequately, in their minds, addressed their
4 concerns and provided conditions in mitigation
5 that they would be satisfied with.

6 As opposed to a bunch of parties sort of
7 running off doing their own thing. Which, if we
8 have to get to that, we have to get to that.

9 So, I would lean towards trying to give
10 staff the maximum reasonable amount of time to do
11 that. And also give them a combination of
12 opportunities that perhaps, and I think the
13 Committee is going to allow some additional
14 discovery, to have data response workshops with
15 respect to those, so that you don't have to have
16 the most formal meetings of exchanging
17 information, that is in writing and back and
18 forth, but you can get together and talk about
19 this stuff.

20 And in addition to that it seems to me
21 that probably what would best happen is that they
22 try to publish something, and then have some
23 workshops on that. And then fine tune that.

24 Now, the vernacular that comes off the
25 second floor as to whether it's a supplement to,

1 or a this, that or the other, we can figure all
2 that out. But as a concept that seems to move
3 this whole thing the best way with the greatest
4 hope of avoiding litigating lots of issues.

5 Now, if you agree, and since I see you
6 nodding yes, can you help me with what do you
7 think in terms of an N-plus is appropriate from
8 the applicant's perspective, given the time -- and
9 I'm not trying to maximize the amount of time
10 we're doing this. God knows it's not in my
11 interest to do that.

12 But it's not in our interest to get to
13 evidentiary hearings too quickly. So, whether an
14 N plus 45 or an N plus 60 for what we would call
15 that final staff assessment, which does not
16 include their revisions, does that seem reasonable
17 to you?

18 MR. MCKINSEY: You know, I'm going to be
19 the last person to try to think that I know how
20 long the staff needs to do anything. And I'm not
21 about to be the one to say I require this for
22 that. The staff has a huge workload, and they
23 have to fit this one into all the other work that
24 they have to accomplish.

25 My only concern would be that they

1 maintain the right focus. For instance, if
2 they're analyzing the biology material, that
3 they're analyzing it under CEQA and not under the
4 Clean Water Act and section 316(b). And what
5 they're trying to determine is whether or not
6 there are significant impacts.

7 So my more concern is that, you know,
8 the right focus is being applied. Especially at
9 this point, what this process requires is not
10 perfection but enough details so that you can
11 satisfy you don't have significant impacts.

12 And other than that I'm completely aware
13 of the workload that the CEC Staff has, and I'm
14 not going to even -- if they say they need a
15 certain period of time, I respect that. And I'm
16 not going to try and attack that.

17 I also agree with the idea, at least in
18 concept, of allowing the staff to issue something
19 and revise it. The only thing I'm hesitant on is
20 commonly what has happened is the staff has had a
21 final staff assessment and then they hold one more
22 workshop on that final staff assessment.

23 And they issue not another staff
24 assessment, but at least some final comments that
25 usually are the prehearing type of comments. And

1 I would be more preferable that that would be the
2 approach, than trying to issue a revised final
3 staff assessment. Simply because that gets into
4 more of a review and more of a production process.

5 HEARING OFFICER SHEAN: Okay.

6 MR. ABELSON: Mr. Shean, if I could just
7 comment on your question about the amount of time
8 after whatever N is, --

9 HEARING OFFICER SHEAN: Um-hum.

10 MR. ABELSON: -- and that you're
11 collecting different opinions as to what needs to
12 be in to start N.

13 But I think the plus 60 is predicated on
14 the one document that we all sort of agree is
15 going to be part of the N, which is this updated
16 biology. The fact that it is going to go through
17 a peer review process, that's something that all
18 the parties that have talked about it have agreed
19 to, and that's going to take -- it's going to come
20 in right around the holiday time, which I might
21 note, as well, just as a practical matter.

22 And then once that's done staff really
23 does need an opportunity to both review the input
24 and to write a thoughtful analysis of that.

25 So I think N plus 60 is rational in

1 terms of why it's being offered. It's probably a
2 period of time that would allow some other areas
3 that might be handled in less than that to also
4 get cleaned up, as well.

5 DR. DAVIS: I just want to weigh in with
6 one comment there. This is Noelle. I think that
7 the 60 day is fine for us to produce the FSA with
8 just one little comment in here, which is that
9 it's possible that when we receive the biology
10 report we may feel that it's basically adequate,
11 and that, you know, it's basically what we can use
12 to determine the significance of impacts.

13 But we may need to come back to the
14 applicant for clarification on a couple of
15 details. And depending on how quickly that
16 response was, that could slow down the process a
17 little bit.

18 HEARING OFFICER SHEAN: Okay, well,
19 we're going to take all the hurdles out of it.

20 All right. Here's what I think we're
21 going to do. Let the Committee go back, take a
22 look at everything we've heard, plus this draft
23 schedule. And we'll come back to the parties with
24 a proposed schedule. And to some degree get your
25 comments back on it.

1 I think what we ultimately need to get
2 from the applicant is its acquiescence in the
3 schedule. And we're going to try to give
4 basically enough confidence to the applicant that
5 there actually is light at the end of the tunnel.

6 And at the same time providing enough
7 flexibility to assure that we get the information
8 that we need; we have the due process afforded all
9 the parties; and that the Committee has sufficient
10 time, particularly if there's significant
11 contentiousness between the parties to deliberate
12 the best decision and then get it out in the form
13 of a Presiding Member's Proposed Decision.

14 So, that's what we're going to do. Give
15 us a little time. We'll crank this out, get it
16 out to you. Solicit your comments, probably in
17 writing, whether or not we have an informal
18 meeting or not, we'll see. And then we'll attempt
19 to establish essentially a final schedule. Or at
20 least the schedule of the moment. Schedule de
21 jour.

22 So, unless there's anything further from
23 any other party, or member of the public, we will
24 conclude our meeting. And thank you.

25 MR. REEDE: Excuse me, Mr. Shean. I

1 just wanted to make -- one of the things I wanted
2 to go over with before we closed out the meeting
3 was the final list of critical path issues so that
4 we're both --

5 HEARING OFFICER SHEAN: I think it's the
6 Committee's job to formulate the list, and it will
7 be on the document. And you can, if it doesn't
8 have something that you want, you can comment. If
9 it has --

10 MR. REEDE: Okay.

11 HEARING OFFICER SHEAN: -- more than you
12 want, --

13 MR. REEDE: That's fine.

14 HEARING OFFICER SHEAN: -- you could do
15 the same.

16 MR. REEDE: Thank you.

17 HEARING OFFICER SHEAN: Thank you.

18 (Whereupon, at 12:30 p.m., the hearing
19 was adjourned.)

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CERTIFICATE OF REPORTER

I, JAMES A. RAMOS, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Hearing; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of November, 2001.

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